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Supreme Court, U.S.
FILED
961052 DEC 19 1996
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

TAK HOW INVESTMENT LIMITED,
Petitioner,

v.

RALPH M. NOWAK, ADMINISTRATOR OF THE ESTATE OF SALLY ANN NOWAK AND INDIVIDUALLY, NICHOLAS M. NOWAK, A MINOR, BY RALPH M. NOWAK, HIS FATHER AND NEXT FRIEND, AND NATHAN G. NOWAK, A MINOR, BY RALPH M. NOWAK, HIS FATHER AND NEXT FRIEND,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The exercise of "specific jurisdiction" over a defendant consistent with the constraints imposed by the Due Process Clause of the Fourteenth Amendment requires, among other things, that the defendant have certain minimum contacts with the forum and that the plaintiff's cause of action arise out of, or relate to, those contacts. This case presents the question — left unanswered in *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 415 n.10 (1984) — of what sort of nexus between the cause of action and the defendant's contacts with the forum is necessary to support the exercise of specific jurisdiction. The specific question presented is whether the respondents' cause of action for the wrongful death of Sally Ann Nowak while a guest at petitioner's hotel in Hong Kong arose out of, or related to, petitioner's act of communicating by telecopier with respondent's employer in Massachusetts regarding its room rates and the decedent's reservation.

2. Whether the petitioner, by (a) advertising in international publications, some of which circulated in Massachusetts, (b) sending a direct mail letter to 15,000 of its previous guests all over the world, and (c) communicating by telecopier with respondent's employer in Massachusetts, purposefully availed itself of the privilege of conducting activities within Massachusetts, thus invoking the benefits and protections of its laws and making its involuntary presence in a Massachusetts court reasonably foreseeable.

3. Whether the assertion of *in personam* jurisdiction over the petitioner, a Hong Kong corporation which has no assets, place of business, shareholders, or employees in Massachusetts, and which has not intentionally solicited business in Massachusetts, is reasonable in light of the factors set forth in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980).

4. Whether the court below erred in affirming the district court's application of a *prima facie* standard to determine the facts

facts upon which it based its jurisdictional ruling, where the petitioner had expressly requested that the court actually adjudicate those facts, and where the district court entered final judgment without ever having heard and determined the facts upon which it predicated its assertion of jurisdiction over the petitioner.

PARTIES TO THE PROCEEDING

The petitioner in this case is Tak How Investment Limited ("Tak How"). Pursuant to Supreme Court R. 29.6, Tak How states that it has no parent companies or nonwholly owned subsidiaries.

The respondents are Ralph M. Nowak, Administrator of the Estate of Sally Ann Nowak and individually; Nicholas M. Nowak, a minor, by Ralph M. Nowak, his father and next friend; and Nathan G. Nowak, a minor, by Ralph M. Nowak, his father and next friend.

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PETITION FOR A WRIT OF CERTIORARI

Tak How Investment Limited respectfully petitions for a writ of certiorari to the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The decision of the Court of Appeals on the merits and denying rehearing and the suggestion for rehearing *en banc* is reported at

94 F.3d 708. The decision of the District Court denying the motion to dismiss for lack of personal jurisdiction is reported at 899 F. Supp. 25.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on August 22, 1996. On September 5, 1996, petitioner filed its Petition for Rehearing and Suggestion for Rehearing *En Banc*. On September 20, 1996 the Court of Appeals denied the Petition for Rehearing and Suggestion for Rehearing *En Banc*. *See* First Circuit Internal Operating Procedure X.C. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

This case began as a wrongful death action arising from the accidental drowning of Ms. Sally Ann Nowak in a swimming pool at the Holiday Inn Crowne Plaza Harbour View Hotel in Hong Kong on September 18, 1993. The respondents, the decedent's husband and minor children ("the Nowaks"), are residents of Massachusetts. They commenced this action against

the petitioner, Tak How Investment Limited ("Tak How"), the owner of the hotel, in June, 1994, in Massachusetts state court. The complaint was served on Tak How, in Hong Kong, on July 25, 1994. Tak How removed the action to the United States District Court for the District of Massachusetts on August 22, 1994, pursuant to 28 U.S.C. § 1441(a). The district court had original jurisdiction pursuant to 28 U.S.C. § 1332(a), the Nowaks being citizens of Massachusetts and Tak How being a citizen of a foreign state, and the amount in controversy, exclusive of interest and costs, exceeding the sum of $50,000.00.

Following the removal of the action to the United States District Court, Tak How filed a motion to dismiss for want of *in personam* jurisdiction. The Nowaks opposed the motion and requested additional time to take discovery of facts relating to jurisdiction. Tak How did not object to the request for discovery, but expressly requested that, following the opportunity for discovery, the court actually adjudicate the facts necessary to determine jurisdiction rather than employ a *prima facie* standard. *See*, *Boit* v. *Gar-Tec Prods., Inc.*, 967 F.2d 671, 674-678 (1st Cir. 1992). The district court allowed the parties approximately five months for jurisdictional discovery. Following the period of discovery, the parties submitted additional factual material in support of, and in opposition to, the motion to dismiss. The record before the district court revealed the following facts.

Tak How is a corporation organized under the laws of Hong Kong. Its only place of business is in Hong Kong. It has no assets, place of business, shareholders or employees in Massachusetts. (4A).[1] It has never been authorized to conduct business, and has never conducted business, in Massachusetts. Its sole asset is a hotel in Hong Kong, known as the Holiday Inn

[1] References to pages in the appendix to this petition are cited as "___A."

Crowne Plaza Harbour View ("the Holiday Inn"). (31A). It operates the hotel as a Holiday Inn pursuant to a written license agreement with Bass European Holdings, N.V., a Netherlands corporation with a principal place of business in Amsterdam, Holland.

The respondent, Ralph Nowak, is employed by Kiddie Products, Inc., a corporation with a place of business in Avon, Massachusetts. Mr. Nowak customarily makes two business trips each year to Hong Kong in connection with his employment. His wife usually accompanied him on one of his two annual trips. (4A).

Employees of Kiddie Products, including vice president John N. Colantuone, have been making business trips to Hong Kong since at least 1982, but have been staying at the Holiday Inn only since 1992. Mr. Colantuone has been making business trips to Hong Kong for Kiddie Products two or three times a year since 1982. (4A-5A). Mr. Colantuone first became aware of the Holiday Inn in 1983 or 1984 as a result of hearing a radio broadcast in Hong Kong and then passing by the hotel, but prior to 1992 he had always stayed at other hotels. (5A). Having become dissatisfied with the other hotels, he decided to stay at the Holiday Inn on a trip in 1992. He was not aware of any solicitation by the Holiday Inn prior to his first stay there in September, 1992. On September 22, 1992, during his first visit to the Holiday Inn, Mr. Colantuone sought and obtained a meeting with the hotel's sales manager, Lana Yip. (5A). Mr. Colantuone requested that the Holiday Inn offer corporate discount rates for future visits of Kiddie Products employees, stating that Kiddie Products employees would stay at the hotel approximately 100 room nights per year. The Holiday Inn agreed to extend its corporate rates to Kiddie Products and Ms. Yip wrote a letter to Colantuone confirming the arrangement based on Kiddie Products' utilizing a minimum number of room nights per year. (5A).

Upon returning from Hong Kong in September, 1992, Mr. Colantuone instructed his administrative assistant, Ms. Marie Burke, to always book Kiddie Products employees at the Holiday Inn so that Kiddie Products could fulfill the necessary number of annual room nights to achieve the corporate discount rate. Although Kiddie Products periodically reviews the rates charged by various Hong Kong hotels, Ms. Burke was told to use the Holiday Inn until instructed otherwise. (5A). As a result of those instructions, Kiddie Products employees have stayed exclusively at the Holiday Inn since September, 1992. Between September, 1992 and June, 1993, Kiddie Products employees stayed at the Holiday Inn in October, 1992, March, 1993, April, 1993, and May, 1993. During that period, Mr. Nowak stayed at the Holiday Inn in October, 1992 and April, 1993.

In 1992 and 1993, Tak How had placed advertisements in certain national and worldwide travel publications, some of which circulated in Massachusetts. (5A). However, Tak How's marketing efforts were directed primarily to Asia and Europe, and Tak How never placed such advertisements with the purpose of soliciting business in Massachusetts. In addition, in February, 1993 Tak How sent a direct mail letter to approximately 15,000 previous guests of its hotel from all over the world. (5A). The Nowaks do not claim that Mr. Colantuone ever saw, or was influenced by, any of these advertisements or the direct mail letter. (43A).

In June, 1993, the Holiday Inn sent a message to Kiddie Products by telecopier announcing its latest corporate discount rates. (5A). Following her receipt of that message, Ms. Burke communicated with the hotel and requested further information. (5A). The hotel sent the information by telecopier. (5A). In July, 1993, Ms. Burke sent a reservation request to the hotel for various Kiddie Products employees for September and October, 1993. (5A). The hotel telecopied reservation

confirmations to Ms. Burke and responded to further communications from her amending the reservations. (32A).

One of the reservations made by Ms. Burke in July was for a September, 1993 trip by the respondent. (5A). Mr. Nowak's wife, Sally Ann Nowak, accompanied him on that trip. On September 18, 1993, Sally Ann Nowak died as a result of drowning in the hotel's swimming pool. (32A-33A).

The principal issue raised by Tak How in its motion to dismiss was whether, in light of the foregoing facts, Ms. Nowak's drowning, and the claims based upon it, could be said to arise out of or relate to Tak How's contacts with Massachusetts for the purpose of determining if the district court could exercise "specific jurisdiction" over it consistent with the limitations imposed by the Due Process Clause of the Fourteenth Amendment. *See*, *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 n.8 (1984).[2] A court may exercise specific jurisdiction over a defendant not present in the forum state only where the defendant has had certain minimum contacts with the forum state which represent a purposeful availment of the privilege of conducting activities there, and where the plaintiff's cause of action "arises directly out of, or relates to," the defendant's forum contacts. *United Elec., Radio & Mach. Workers of Am.* v. *163 Pleasant St. Corp.*, 960 F.2d 1080, 1088-1089 (1st Cir. 1992) ("*Pleasant St.*").

In moving to dismiss, Tak How relied on a line of recent First Circuit decisions, beginning with *Marino* v. *Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986),[3] each of which involved a tort claim for injuries suffered by a hotel patron in a foreign juris-

[2] The Nowaks did not contend that Tak How's activities in Massachusetts were "continuous and systematic" such that the district court could exercise general jurisdiction. *Helicopteros*, 466 U.S. at 414 n.9.

[3] *See also, Crocker* v. *Hilton Int'l Barbados, Ltd.*, 976 F.2d 797 (1st Cir. 1992); *Fournier* v. *Best Western Treasure Island Resort*, 962 F.2d 126 (1st Cir. 1992); *Pizarro* v. *Hoteles Concorde Int'l, C.A.*, 907 F.2d 1256 (1st Cir. 1990).

diction, and each of which held that the plaintiff's cause of action did not arise from or relate to the defendant's acts of confirming the plaintiff's room reservation in the forum state or of placing advertising within the forum state. The Court of Appeals reasoned in those cases that whether a plaintiff's claim arises out of a defendant's contacts with the forum turns on whether the defendant's actions can be said to be the legal, or proximate, cause of the plaintiff's injuries and whether the defendant's contacts with the forum are substantively relevant to the plaintiff's claims. *Pleasant St.*, 960 F.2d at 1089; *Pizarro*, 907 F.2d at 1259; *Marino*, 793 F.2d at 430. The First Circuit's adoption of that "substantive relevance/proximate cause" standard for assessing the relatedness of a plaintiff's claims to the defendant's contacts was contrary to decisions in other courts of appeal which have held that a plaintiff's cause of action for injuries would arise from a defendant's contacts with the forum state if the plaintiff would not have been injured "but for" those contacts. *See, e.g., Shute* v. *Carnival Cruise Lines*, 897 F.2d 377, 383-386 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991); *Lanier* v. *American Bd. of Endodontics*, 843 F.2d 901, 908-911 (6th Cir.), *cert. denied*, 488 U.S. 926 (1988).

In 1994, the Supreme Judicial Court of Massachusetts decided the case of *Tatro* v. *Manor Care, Inc.*, 416 Mass. 763, 625 N.E.2d 549 (1994), a negligence action brought against the owner of a California hotel at which the plaintiff, a Massachusetts resident, had sustained personal injuries. In *Tatro*, the Supreme Judicial Court, relying on *Shute*, *Lanier*, and a footnote in *Prejean* v. *Sonatrach, Inc.*, 652 F.2d 1260, 1270 n.21 (5th Cir. Unit A 1981), disagreed with the reasoning of *Marino* and its progeny, and held that for the purpose of the Massachusetts long-arm statute, Mass. Gen. Laws c. 223A, § 3, a tort cause of action may be said to "arise from" a defendant's contacts with Massachusetts whenever those con-

tacts are the actual, or "but for," cause of the plaintiff's injuries. *Tatro*, 416 Mass. at 770-771, 625 N.E.2d at 553-554. Because the facts in *Tatro* showed that the defendant hotel had solicited conference business in Massachusetts and that the plaintiff had made a reservation and had attended a conference at the hotel in response to the hotel's solicitation, the Court held that the plaintiff's injuries, suffered while a guest at the hotel, arose out of the hotel's Massachusetts solicitation because, but for that solicitation, the plaintiff would not have stayed at the hotel and would not have been injured. *Id.* at 771-772, 625 N.E.2d at 554. Without separately analyzing the requirement of relatedness as a matter of constitutional law, the Supreme Judicial Court proceeded to conclude that the assertion of jurisdiction was consistent with the restraints imposed by the Due Process Clause of the Fourteenth Amendment. *Id.* at 772, 625 N.E.2d at 554.

In opposing Tak How's motion to dismiss, the Nowaks relied extensively upon *Tatro*. The Nowaks argued that the *Marino* cases were limited to construing the Massachusetts and Puerto Rico long-arm statutes and therefore had been overruled by the Supreme Judicial Court in *Tatro*. As support for its argument that the *Marino* cases were limited to state law issues, the Nowaks pointed to a footnote in *Ticketmaster-New York, Inc.* v. *Alioto*, 26 F.3d 201, 207 n.8 (1st Cir. 1994) ("In our view, these cases . . . deal with state-law issues and have no real implications for the relatedness requirement specifically or for constitutional analysis generally.").

Tak How argued, on the other hand, that although the First Circuit did not expressly reach the constitutional issue in any of the *Marino* cases, having determined in each case that the cause of action did not arise from the defendant's contacts with the forum for the purpose of the relevant long-arm statute, the principles articulated by the Court of Appeals in those cases were nonetheless principles of constitutional significance,

and had been treated as principles of constitutional law in subsequent First Circuit decisions. *Pleasant St.*, 960 F.2d at 1089; *Sawtelle* v. *Farrell*, 70 F.3d 1381 (1st Cir. 1995). Therefore, Tak How argued, as principles of constitutional law, the holdings of *Marino* and its progeny survived the *Tatro* decision and should govern the district court's determination of whether it could exercise specific jurisdiction over Tak How.

After hearing oral argument, the district court entered a memorandum and order dated August 29, 1995 denying Tak How's motion to dismiss. (29A). Applying a *prima facie* standard of review, the district court held that Tak How had solicited in Massachusetts the business of Kiddie Products and that the Nowaks' claims arose out of or related to Tak How's Massachusetts contacts under both the long-arm statute and the Fourteenth Amendment. (41A). Relying on the *Ticketmaster* footnote, the district court concluded that "*Tatro* has apparently consigned the 'arising out of' analysis of *Marino* and its progeny to the dustbin of First Circuit jurisprudence." (39A).

Tak How filed a motion for certification of the district court's August 29, 1995 order pursuant to 28 U.S.C. § 1292(b) and requested a stay of proceedings. The district court granted the motion for certification, but denied the request for a stay. Tak How then filed a petition for permission to appeal to the United States Court of Appeals for the First Circuit, and requested the Court of Appeals to stay the district court proceedings. The Court of Appeals denied the request for a stay.

Faced with the Hobson's choice of voluntarily submitting, under Hong Kong law, to the district court's jurisdiction by defending on the merits, or of being defaulted, Tak How chose not to file an answer to the Nowaks' complaint. Accordingly, on November 9, 1995, the district court entered a default judgment against Tak How in the amount of $3,128,168.33 (27A-28A).[4]

[4]In light of the entry of final judgment by default, the Court of Appeals denied Tak How's petition for permission to appeal as moot.

Tak How then appealed from that final judgment pursuant to 28 U.S.C. § 1291.

The principal issue in the Court of Appeals was the same as that argued in the district court, namely whether the holdings of *Marino* and its progeny that the "relatedness" prong of specific jurisdiction required a finding of a proximate cause relationship between the plaintiff's claim and the defendant's contacts with the forum were principles of constitutional significance that survived the contrary holding of the Supreme Judicial Court in *Tatro*. In affirming the district court, the Court of Appeals held that the *Marino* line of cases did indeed have constitutional significance. (9A, 14A). After canvassing the law of "relatedness" in other circuits, the court reaffirmed its commitment to the proximate cause standard and its view that the proximate cause standard, rather than a "but for" standard, better serves the policies that underlie the relatedness requirement. (14A). The court went on to hold, however, that strict adherence to a proximate cause standard is unnecessarily restrictive. (14A). It held that where a foreign corporation directly targets residents of the forum in an effort to further a business relationship, it is not necessarily unreasonable to subject that corporation to forum jurisdiction when its efforts "lead to" a tortious result. (14A-15A). The court characterized its new rule as "a small overlay of 'but for' on 'proximate cause.'" (15A). The court stated that it intended by this approach "to emphasize the importance of proximate cause, but to allow a slight loosening of that standard when circumstances dictate." (16A). The Court of Appeals conceded that "it will not always be easy to apply this flexible approach to particular circumstances," but concluded "that is a function of the complexity of this area of the law." (16A).

The Court of Appeals also affirmed the district court's application of a *prima facie* standard of review and the district court's finding that Tak How purposefully availed itself of the

privilege of conducting activities within Massachusetts and that the assertion of personal jurisdiction over Tak How was reasonable. (6A, 16A-22A).

On September 6, 1996, Tak How timely filed with the Court of Appeals a petition for rehearing and suggestion for rehearing *en banc*. The Court of Appeals denied Tak How's petition on September 20, 1996.[5] (1A).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

In *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), this Court laid the foundation for modern personal jurisdiction law based upon a defendant's "minimum contacts" with the forum state. It rejected earlier doctrine which required a defendant's "presence" within the territorial jurisdiction of a court in order to render a binding judgment against it. *See*, *Pennoyer* v. *Neff*, 95 U.S. 714 (1877). It held that due process requires only that a defendant who is not present within the territory of the forum have certain minimum contacts with the forum such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316, quoting *Milliken* v. *Meyer*, 311 U.S. 457 (1940).

In formulating its new minimum contacts rule the Court drew a distinction between activities of a corporation which give rise to the liabilities sued upon and those causes of action that are unrelated to the corporation's activities.

> While it has been held in cases on which appellant relies that continuous activity of some sorts within a state is not enough to support the demand that the cor-

[5] Under First Circuit Internal Operating Procedure X.C., a "suggestion for rehearing *en banc* will also be treated as a petition for rehearing before the original panel."

> poration be amenable to suits unrelated to that activity, there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.
>
> . . . . .
>
> But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

International Shoe, 326 U.S. at 318, 319 (citations omitted). Years later, the terms "general jurisdiction" and "specific jurisdiction" were coined to identify the distinction first drawn in *International Shoe* between those causes of action arising from a defendant's activities in the forum state and those unrelated to the defendant's activities. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 nn.8 & 9 (1984), citing Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1144-1164 (1966).

It has become generally accepted that the exercise of specific jurisdiction over a defendant is constitutionally permissible only if (1) the plaintiff's claim arises out of, or relates to, the defendant's contacts with the forum state (the "relatedness" requirement), (2) the defendant's contacts represent a purposeful availment of the privilege of conducting activities within the

forum state, thus invoking the benefits and protections of its laws, and (3) the exercise of jurisdiction is reasonable in light of various factors.[6] *See, e.g., United Elec., Radio & Mach. Workers* v. *163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992) ("*Pleasant St.*"); *Shute* v. *Carnival Cruise Lines*, 897 F.2d 377, 381 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991); *Third Nat'l Bank* v. *Wedge Group, Inc.*, 882 F.2d 1087, 1089-1090 (6th Cir. 1989), *cert. denied*, 493 U.S. 1058 (1990); *Coats* v. *Penrod Drilling Corp.*, 5 F.3d 877, 883-85 (5th Cir. 1993), *cert. denied* 510 U.S. 1195 (1994), *opinion reinstated in part upon rehearing en banc*, 61 F.3d 1113 (5th Cir. 1995). The First Circuit refers to this test as the tripartite test for personal jurisdiction. *See*, *Pritzker* v. *Yari*, 42 F.3d 53, 60-61 (1st Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1959, 131 L. Ed. 2d 851 (1995).

While there is general agreement on the tripartite test for specific jurisdiction, the courts of appeal have differed widely on the meaning of the relatedness requirement. In *Helicopteros*, this Court expressly declined to reach the questions of (1) whether the terms "arising out of" and "relating to" describe different connections between the cause of action and the defendant's contacts with the forum, and (2) what sort of tie between a cause of action and the defendant's contacts is necessary to a determination of relatedness. *Helicopteros*, 466 U.S. at 415 n.10. Left without guidance by this Court, the various courts of appeal are hopelessly muddled in their approach to the issue of relatedness.

As will be seen, some circuits apply a "but for" test for determining relatedness; some circuits apply a "substantive relevance/proximate cause" test; at least one circuit applies a

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[6] These factors, articulated by the Supreme Court in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980), have been dubbed the "Gestalt factors" by the First Circuit. *Pleasant Street*, 960 F.2d at 1088.

"substantial connection" test. Worse yet, some circuits are internally inconsistent in their approach. In the present case, the First Circuit has added immeasurably to the confusion by engrafting a "small overlay" of "but for" onto "proximate cause," the deviation to be applied "when circumstances dictate." (15A-16A). Tak How respectfully submits that this new standard adopted by the Court of Appeals in this case is unbounded by any meaningful definition and thus provides no guidance either to prospective defendants who may wish to know what conduct will subject them to a particular state's jurisdiction or to the courts which must now attempt to apply it. Accordingly, it is submitted that this case presents an appropriate, if not compelling, opportunity for this Court to address the questions left unanswered in *Helicopteros* and thereby provide some guidance to the lower federal courts in this important area of constitutional law.[7]

In determining whether a cause of action arises out of, or relates to, a defendant's contacts with the forum, some of the circuits apply causation principles derived from tort law. Prior to its decision in this case, the First Circuit had traditionally required a court to find a proximate cause relationship between the defendant's forum-state activities and the claim underlying the litigation. *Sawtelle* v. *Farrell*, 70 F.3d 1381, 1389 (1st Cir. 1995); *Pleasant St.*, 960 F.2d at 1089. The Ninth Circuit, on the other hand, has adopted a "but for" standard. In *Shute* v. *Carnival Cruise Lines*, the court held that a "but for" standard satisfied the due process requirements for relatedness without unduly restricting the jurisdiction of the court in the way a proximate cause standard would. *Shute*, 897 F.2d at 385-386. Even though *Shute* was reversed by this Court on other grounds,

[7] This Court has previously accepted the issue of relatedness for review in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991), but ultimately determined that the case should be reversed on the non-constitutional ground that the Court of Appeals erred in failing to enforce the forum selection clause in the parties' contract. *Id.* at 589.

Carnival Cruise Lines, Inc. v. *Shute*, 499 U.S. 585 (1991), the Ninth Circuit has continued to apply the "but for" test. *Ballard* v. *Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995); *Terracom* v. *Valley Nat'l Bank*, 49 F.3d 555, 561 (9th Cir. 1995).

Other courts of appeal have lined up, with varying degrees of clarity or certitude, behind one of these two tests. While not stating so specifically, the Second and Eighth Circuits seem to have applied the proximate cause standard. In *Gelfand* v. *Tanner Motor Tours, Ltd.*, 339 F.2d 317 (2d Cir. 1964), the court, without explicitly stating a standard for the "arising out of" test, held that the plaintiffs' injury in a bus accident in Arizona did not arise from the purchase of a ticket in New York through a New York travel agency. *Id.* at 321-322. In *Morris* v. *Barkbuster, Inc.*, 923 F.2d 1277, 1281-1285 (8th Cir. 1991), the Eighth Circuit engaged in a long analysis of the facts to conclude that the plaintiff's injuries from a defective log splitter did not arise from the defendants' Minnesota activities. Like the *Gelfand* court, the Eighth Circuit did not explicitly state that it was applying a proximate cause standard. Nevertheless, its analysis suggests that it was, indeed, looking for a proximate cause connection between the defendants forum-state activities and the plaintiff's injuries, a connection it did not find. *Id.*[8] Finally, the Fourth Circuit has applied the "proximate cause" test in interpreting the Virginia long-arm statute, and a district court in the Third Circuit has also adopted the "proximate cause" test. *See City of Virginia Beach* v. *Roanoke River Basin Ass'n*, 776 F.2d 484, 487-488 (4th Cir. 1985); *Wims* v. *Beach Terrace Motor Inn, Inc.*, 759 F. Supp. 264, 268 (E.D. Pa. 1991).

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[8] In *Pearrow* v. *National Life & Accident Ins. Co.*, 703 F.2d 1067, 1069 (8th Cir. 1983), the court was more explicit about using a proximate cause standard. However, in that case, the court was interpreting the Arkansas long-arm statute, not the relatedness requirement of the Due Process Clause of the Fourteenth Amendment. *Id.*

Other circuits have been even less clear when seeming to apply the "but for" standard of relatedness. In *Lanier* v. *American Bd. of Endodontics*, 843 F.2d 901, 908-911 (6th Cir.), *cert. denied*, 488 U.S. 926 (1988), the court seemed to look for a "but for" relationship between the defendant's activities and the plaintiff's cause of action. However, the *Lanier* court's analysis flies in the face of the standard articulated by the Sixth Circuit in *Third Nat'l Bank* v. *Wedge Group*, which required that the plaintiff's cause of action have a substantial connection with the defendant's in-state activities. *Wedge*, 882 F.2d at 1091.

As for the Fifth Circuit, that court has, in *dicta*, supported the exercise of personal jurisdiction where there is a "but for" relationship between the defendant's contract and the plaintiff's cause of action. *Prejean* v. *Sonatrach, Inc.*, 652 F.2d 1260, 1270 n.21 (5th Cir. Unit A 1981). However, the Fifth Circuit has been inconsistent on this issue. In other cases the court seems to have applied both the "but for" and the "proximate cause" test. *Compare Coates*, 5 F.3d at 883-884; *with Aviles* v. *Kunkle*, 978 F.2d 201, 205 (5th Cir. 1992). Moreover, the district courts of the Fifth Circuit seem simply to have ignored *Prejean* and applied a proximate cause test. As one court has stated, "*[i]n personam* jurisprudence has taken a restrictive view of the relationship between causes of action and contacts, seemingly to require virtually a direct link between claim and contacts in order to pursue a specific jurisprudence analysis." *Kervin* v. *Red River Ski Area, Inc.*, 711 F. Supp. 1383, 1389-1390 (E.D. Tex. 1989). Other district courts in the Fifth Circuit have agreed. *See Luna* v. *Compania Panamena de Aviacion, S.A.*, 851 F. Supp. 826, 832 (S.D. Tex. 1994) (quoting *Kervin*).

The Seventh Circuit has adopted neither the "but for" nor the "proximate cause" test for assessing personal jurisdiction. Instead, the court's due process analysis has merely focussed

on the reasonableness of asserting personal jurisdiction over the defendant. *Deluxe Ice Cream Co.* v. *R.C.H. Tool Corp.*, 726 F.2d 1209, 1216 (7th Cir. 1984); *In re Oil Spill by Amoco Cadiz*, 699 F.2d 909, 914-915 (7th Cir. 1983). In those cases the court also discussed whether the plaintiff's claims lay in the wake of the commercial activities by which the defendant submitted to the jurisdiction of the Illinois courts, but this analysis applied only to jurisdiction under the Illinois long-arm statute. *See Deluxe Ice Cream Co.*, 726 F.2d at 1215; *Amoco Cadiz*, 699 F.2d at 915-916. At least one district court in the Seventh Circuit has applied what looks like a "proximate cause" standard to determine relatedness under the Due Process clause by looking for some "substantive relevance" between the cause of action and the defendant's forum-state activities. *Simpson* v. *Quality Oil Co.*, 723 F. Supp. 382, 388 & 388 n.4 (S.D. Ind. 1989).

The utter conflict and confusion among and within the circuits over the proper test for relatedness has only been made worse by the court's decision in this case. The court first reaffirmed its commitment to a "proximate cause" standard for relatedness. (14A). It set forth the sound constitutional and legal basis for such a standard. (13A-14A). However, instead of resting there, the court went on to contradict its own standard by then announcing that "strict adherence to a proximate cause standard in all circumstances is unnecessarily restrictive." (14A). It added what it called "a small overlay of 'but for' on 'proximate cause'" in order to affirm the district court's assertion of jurisdiction over the petitioner. (15A). By adding a "small overlay" of "but for" to its previously clear and consistent "proximate cause" test, the First Circuit has created a new, two-part standard for relatedness found nowhere else in federal jurisprudence. Moreover, the court's "small overlay" has created a relatedness test that is vague, internally inconsistent and impossible to apply. In effect, under the First Circuit's

new standard, a defendant can only be subjected to the jurisdiction of the court if its forum-state activities bear a proximate-cause relationship to the plaintiff's cause of action, unless, applying the "small overlay," the court decides to use the less restrictive "but for" standard to assert jurisdiction.

The Due Process Clause serves to protect individuals' liberty interests by ensuring that they have " 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign' " and by giving " 'a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.' " *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985), quoting *Shaffer* v. *Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment) and *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. at 297. Both the absence of uniformity of decision among the circuits and the uncertainty engendered by the First Circuit's adoption of a new and whimsical test of relatedness are directly counter to the important policies of fairness and predictability that due process is intended to further.[9]

With the court's decision below, federal courts now apply at least four, and possibly five, different and contradictory standards for determining whether a plaintiff's cause of action arises out of or is related to the defendant's contacts with the forum. This is an intolerable state of affairs. The issue of the proper standard to apply to measure relatedness, involving liberty interests and the fundamental fairness of our system of justice, is an important issue of constitutional law that deserves uniformity. It is an issue that cries out for clarification by this Court.

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[9] Prior to the decision by the Court of Appeals in this case, the substantive relevance/proximate cause standard uniformly employed in the First Circuit provided predictability and clarity. *See*, Flavio Rose, Comment, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 Cal. L. Rev. 1545, 1586-89 (1994).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 19, 1996

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APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 96-1006

RALPH M. NOWAK, ADMINISTRATOR OF THE ESTATE OF SALLY ANN NOWAK, ET AL.,

PLAINTIFFS, APPELLEES,

v.

TAK HOW INVESTMENTS, LTD., D/B/A HOLIDAY INN CROWNE PLAZA HARBOUR VIEW,

DEFENDANT, APPELLANT.

Before

Torruella, Chief Judge

Coffin, Senior Circuit Judge

Selya, Cyr, Boudin, Stahl and Lynch, Circuit Judges

and Cummings,* Circuit Judge

ORDER OF COURT

Entered: September 20, 1996

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing *en banc* having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court *en banc*.

It is ordered that the petition for rehearing and the suggestion for rehearing *en banc* be denied.

By the Court:
WILLIAM H. NG, CLERK.

By JANET M. O'NEIL
Chief Deputy Clerk.

*Of the Seventh Circuit, sitting by designation.

[cc.: Messrs: Rubenstein and Fegreus]

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1006

RALPH M. NOWAK, ADMINISTRATOR OF THE ESTATE OF SALLY ANN NOWAK, ET AL.,
PLAINTIFFS, APPELLEES,

v.

TAK HOW INVESTMENTS, LTD., D/B/A HOLIDAY INN CROWNE PLAZA HARBOUR VIEW,
DEFENDANT, APPELLANT.

JUDGMENT

Entered: August 22, 1996

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed in accordance with the opinion filed this day.

By the Court:

WILLIAM H. NG, CLERK.

By JANICE M. O'NEIL
Chief Deputy Clerk.

[cc: Messrs: Rubenstein and Fegreus]

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1006

RALPH M. NOWAK, ADMINISTRATOR OF THE ESTATE OF SALLY ANN NOWAK, ET AL.,
PLAINTIFFS-APPELLEES,

v.

TAK HOW INVESTMENTS, LTD., D/B/A HOLIDAY INN CROWNE PLAZA HARBOUR VIEW,
DEFENDANT-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. WILLIAM G. YOUNG, U.S. District Judge]

Before
Stahl, Circuit Judge,
Coffin, Senior Circuit Judge,
and Cummings,* Circuit Judge.

Alan B. Rubenstein, with whom Robert B. Foster and Rackemann, Sawyer & Brewster were on brief for appellant.
Edward Fegreus for appellees.

August 22, 1996

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*Of the Seventh Circuit, sitting by designation.

CUMMINGS, Circuit Judge.[1] A Massachusetts resident who accompanied her husband on a business trip to Hong Kong drowned in their hotel's swimming pool. Plaintiffs later brought this wrongful death diversity action against the Hong Kong corporation that owns the hotel — a corporation that has no place of business outside of Hong Kong. Defendant moved for dismissal, arguing that a Massachusetts court could not exercise personal jurisdiction consistently with due process and, alternatively, that the case should be dismissed on the grounds of *forum non conveniens*. The district court denied both motions, and we now affirm.

I.

Tak How is a Hong Kong corporation with its only place of business in Hong Kong. Its sole asset is the Holiday Inn Crowne Plaza Harbour View in Hong Kong ("Holiday Inn"), where the accident in this case took place. Tak How has no assets, shareholders, or employees in Massachusetts. Sally Ann Nowak ("Mrs. Nowak") was at all relevant times married to plaintiff Ralph Nowak ("Mr. Nowak") and was the mother of their two children (collectively, the plaintiffs are "the Nowaks"). The Nowaks lived in Marblehead, Massachusetts, and Mr. Nowak was employed by Kiddie Products, Inc., which has its place of business in Avon, Massachusetts. Kiddie Products does extensive business in Hong Kong. As a Preliminary Design Manager in the Marketing Department, Mr. Nowak customarily made two business trips to Hong Kong each year, accompanied by his wife on one of those trips.

Kiddie Products employees had made trips to Hong Kong since at least 1982, but the company's relationship with Tak

[1] Section II.A. was authored by Judge Coffin. This opinion was circulated to the active judges of the First Circuit before issuance. This informal circulation, however, is without prejudice to a petition for rehearing or suggestion of *en banc* reconsideration on any issue in the case. *NLRB* v. *Hospital San Rafael, Inc.*, 42 F.3d 45, 51 n.1 (1st Cir. 1994).

How and the Holiday Inn began only in 1992. John Colantuone, a vice-president, was one such employee who had travelled to Hong Kong since 1982 and had stayed at various other hotels. Colantuone was acquainted with the Holiday Inn through advertisements on Hong Kong radio in 1983 or 1984, but only decided to stay there in 1992 after becoming dissatisfied with the rates at other hotels. On his first visit, Colantuone met with the Holiday Inn's sales manager to negotiate a corporate discount for Kiddie Products employees. Holiday Inn agreed to the discount and wrote a letter confirming the arrangement based on a minimum number of room nights per year. Marie Burke, Colantuone's administrative assistant, made all hotel reservations for the company's employees. Although Kiddie Products regularly compared rates at other hotels, Burke was told to book all reservations at the Holiday Inn until instructed otherwise. Since 1992, Kiddie Products employees have stayed exclusively at the Holiday Inn.

In June 1993, the Holiday Inn telecopied Colantuone a message announcing new corporate rates and other promotional materials. Burke requested additional information, and the hotel promptly responded. In July 1993, after a series of exchanges by telecopier, Burke sent a reservation request to the Holiday Inn for several employees for September and October 1993. One of the reservations was for Mr. and Mrs. Nowak to arrive on September 16. On September 18, while the Nowaks were registered guests at the hotel, Mrs. Nowak drowned in the hotel swimming pool. The specific facts surrounding her death are not relevant here. It is uncontested that in 1992 and 1993, prior to Mrs. Nowak's death, Tak How advertised the Holiday Inn in certain national and international publications, some of which circulated in Massachusetts. In addition, in February 1993, Tak How sent direct mail solicitations to approximately 15,000 of its previous guests, including previous guests residing in Massachusetts.

The Nowaks filed this wrongful death action in Massachusetts state court in June 1994. Tak How then removed the case to federal district court and filed two motions to dismiss — one for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2) and the other for *forum non conveniens*. The district court initially denied the motion to dismiss for *forum non conveniens*, and then, after allowing time for jurisdictional discovery, issued a memorandum and order denying the Rule 12(b)(2) motion. *Nowak* v. *Tak How Inv. Ltd.*, 899 F.Supp. 25 (D. Mass. 1995). The district court granted Tak How's motion for certification of the jurisdictional issue, but this Court denied Tak How's request for a stay of the district court proceeding pending appeal. Nonetheless, believing that a resulting judgment would not be enforceable in Hong Kong, Tak How did not answer the Nowaks' complaint. Accordingly, the district court entered a default judgment against Tak How for $3,128,168.33. Tak How appeals the denial of its Rule 12(b)(2) motion and its motion to dismiss the case for *forum non conveniens*.

II.

We first review the denial of Tak How's motion to dismiss for lack of personal jurisdiction. The district court employed a prima facie standard in making its determination rather than adjudicating the jurisdictional facts. *See Foster-Miller, Inc.* v. *Babcock & Wilcox Can.*, 46 F.3d 138, 145-47 (1st Cir. 1995). Both the court's decision to use the prima facie standard and its conclusion under that standard are reviewed *de novo*. *Id.* at 147. To begin, we find no error in the district court's choice of the prima facie standard. A full-blown evidentiary hearing was not necessary in this case because the facts were, in all essential respects, undisputed. In such circumstances, the prima facie standard is both appropriate and preferred. *Id.* at 145; *Boit* v. *Gar-Tec Prods., Inc.*, 967 F.2d 671, 675-76 (1st Cir. 1992).

The next question is whether the district court reached the proper result. In diversity cases such as this, the district court's personal jurisdiction over a nonresident defendant is governed by the forum state's long-arm statute. *Sawtelle* v. *Farrell*, 70 F.3d 1381, 1387 (1st Cir. 1995). Under the Massachusetts statute,

> [a] court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's . . . transacting any business in this Commonwealth.

Mass. Gen. Laws Ann. c. 223A, § 3(a) (1985). The statute imposes constraints on personal jurisdiction that go beyond those imposed by the Constitution. *Gray* v. *O'Brien*, 777 F.2d 864, 866 (1st Cir. 1985). We must therefore find sufficient contacts between the defendant and the forum state to satisfy both the Massachusetts long-arm statute and the Constitution. *Sawtelle*, 70 F.3d at 1387.

To satisfy the requirements of the long-arm statute, § 3(a), the defendant must have transacted business in Massachusetts and the plaintiffs' claim must have arisen from the transaction of business by the defendant. *Tatro* v. *Manor Care, Inc.*, 625 N.E.2d 549, 551 (Mass. 1994). In *Tatro*, a Massachusetts plaintiff sued a California hotel for injuries sustained in California. The Court concluded that the hotel's solicitation of business from Massachusetts residents satisfied the "transacting any business" requirement of § 3(a), *id.* at 551-52, and that the "arising from" requirement was satisifed where, but for the hotel's solicitation and acceptance of reservations, the plaintiff would not have been injured in California. *Id.* at 554. The factual scenario in the present case is analogous in all essential respects, and we therefore have little difficulty con-

cluding that sufficient contacts exist to satisfy § 3(a)'s requirements.

Turning to the constitutional restraints, this Court follows a tripartite analysis for determining the existence of specific personal jurisdiction (plaintiffs do not allege general personal jurisdiction):

> First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state activities. Second, the defendant's forum-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's court foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable.

Pritzker v. *Yari*, 42 F.3d 53, 60-61 (1st Cir. 1994) (quoting *United Elec. Workers* v. *163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992)), *cert. denied*, 115 S.Ct. 1959.

A. Relatedness

What this Court calls the "relatedness" test is one aspect of demonstrating minimum contact pursuant to *International Shoe Co.* v. *Washington*, 326 U.S. 310. The other aspect, discussed below, focuses on the deliberateness of the defendant's contacts, or purposeful availment. Tak How's principal argument on appeal is that relatedness requires a proximate cause relationship between its contacts with Massachusetts and the Nowaks' cause of action.

In arguing for a proximate cause relatedness test, Tak How relies on a series of First Circuit cases beginning with *Marino* v. *Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986). *See Crocker* v.

Hilton Int'l Barbados, Ltd., 976 F.2d 797 (1st Cir. 1992); *Fournier* v. *Best Western Treasure Island Resort*, 962 F.2d 126 (1st Cir. 1991); *Pizarro* v. *Hoteles Concorde Int'l, C.A.*, 907 F.2d 1256 (1st Cir. 1990). In each of these cases, this Court construed the language of a state long-arm statute requiring, as does the Massachusetts statute quoted above, that the cause of action "arise" from the forum-state contacts. Construing those statutes, we rejected plaintiffs' arguments that the injury at issue would not have occurred "but for" the forum-state contacts. Instead, we held that the defendant's conduct must be the legal or proximate cause of the injury. *Pizarro*, 907 F.2d at 1260.

At least for purposes of construing the Massachusetts long-arm statute, the Supreme Judicial Court of Massachusetts dealt our restrictive interpretation a fatal blow in *Tatro, supra*. The Court decided that the "but for" test is more consistent with the language of the long-arm statute and explicitly rejected our interpretation of the statute in the *Marino* line of cases. 625 N.E.2d at 553. Personal jurisdiction was proper in *Tatro* because the California hotel had solicited business in Massachusetts and had agreed to provide the plaintiff with accommodations; but for those acts, the plaintiff would not have been injured. *Id.* at 554.

Tak How contends that *Tatro* was not fatal to *Marino* and its progeny. It concedes, as it must, that *Tatro* is controlling insofar as it deals with the construction of the Massachusetts long-arm statute, but insists that the relatedness discussion in *Marino* had constitutional significance as well. Its position is not without support. In *Pleasant Street*, we stated that the Massachusetts statute's relatedness requirement "mirrors a key constitutional requirement for the exercise of specific jurisdiction." 960 F.2d at 1087. Then, in explaining constitutional relatedness, we set forth proximate cause principles derived from the *Marino* line of cases. *See id.* at 1089.

The Nowaks, on the other hand, argue that these cases have no constitutional significance. They find support from a footnote in *Ticketmaster-New York, Inc.* v. *Alioto*, 26 F.3d 201, 207 n.8 (1st Cir. 1994):

> In our view, [the *Marino* line of cases] — which interpret the term "arising from" as that term is used in the long-arm statutes of Massachusetts — deal with state-law issues and have no real implication for the relatedness requirement specifically or for constitutional analysis generally.

(citations omitted).

Despite the apparent conflict, these cases are arguably reconcilable. After all, *Ticketmaster* did not directly reject *Pleasant Street* or the proximate cause test, but merely stated the evident fact that the *Marino* line of cases centered on interpretations of state law. It might follow, then, that our discussion in *Pleasant Street* should govern our course here. *Pleasant Street*, however, as well as *Ticketmaster*, described the relatedness concept in only the most general way. Neither case specifically defined the precise inquiry under the relatedness test in this circuit. Fortunately, however, these cases, and others, articulated certain principles that guide our inquiry.

As an initial matter, [w]e know . . . that the [relatedness] requirement focuses on the nexus between the defendant's contacts and the plaintiff's cause of action." *Ticketmaster*, 26 F.3d at 206. The requirement serves two purposes.

> First, relatedness is the divining rod that separates specific jurisdiction cases from general jurisdiction cases. Second, it ensures that the element of causation remains in the forefront of the due process investigation.

Id. Most courts share this emphasis on causation, but differ over the proper causative threshold. Generally, courts have gravitated toward one of two familiar tort concepts — "but for" or "proximate cause."

The Ninth Circuit is the most forceful defender of the "but for" test. In *Shute* v. *Carnival Cruise Lines*,[2] the Court stated that "but for" serves the basic function of relatedness by "preserv[ing] the essential distinction between general and specific jurisdiction." 897 F.2d 377, 385 (9th Cir. 1990). A more stringent standard, the court asserted, "would represent an unwarranted departure from the core concepts of 'fair play and substantial justice,' " because it would preclude jurisdiction in cases where it would be reasonable. *Id.* at 386. In turn, in those cases where "but for" might lead to an unreasonable result, the court predicted that the third prong — the reasonableness inquiry — would guard against unfairness.

Shute and its progeny represent the only explicit adoption of the "but for" test. Nonetheless, cases from other circuits suggest a similar approach. In *Prejean* v. *Sonatrach, Inc.*, the Fifth Circuit noted:

> Logically, there is no reason why a tort cannot grow out of a contractual contact. In a case like this, a contractual contact is a "but for" causative factor for the tort since it brought the parties within tortious "striking distance" of one another. While the relationship between a tort suit and a contractual contact is certainly more tenuous than when a tort suit arises from a tort contact, that only goes to whether the

[2] *Shute* was reversed by the Supreme Court on alternative grounds. 499 U.S. 585. As reflected by subsequent cases, the Ninth Circuit still adheres to the "but for" test. *See Ballard* v. *Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995); *Terracom* v. *Valley Nat'l Bank*, 49 F.3d 555, 561 (9th Cir. 1995). *But see Omeluk* v. *Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 271 (9th Cir. 1995) (questioning *Shute*'s authority).

> contact is by itself sufficient for due process, not whether the suit arises from the contact.

652 F.2d 1260, 1270 n.21 (5th Cir. 1981). Subsequent cases, however, have not always followed this teaching. *See Luna* v. *Compañía Panameña de Aviación, S.A.*, 851 F.Supp. 826, 832 (S.D. Tex. 1994) (employing a proximate cause standard); *Kervin* v. *Red River Ski Area, Inc.*, 711 F.Supp. 1383, 1389-90 & n.11 (E.D. Tex. 1989) (same).

The Sixth Circuit applies a "substantial connection" standard. *See Third Nat'l Bank* v. *WEDGE Group, Inc.*, 882 F.2d 1087, 1091 (6th Cir. 1989), *cert. denied*, 493 U.S. 1058; *Southern Mach. Co.* v. *Mohasco Indus., Inc.*, 401 F.2d 374, 384 n.27 (6th Cir. 1968). The court's discussion in *Lanier* v. *American Board of Endodontics*, 843 F.2d 901, 908-11 (6th Cir. 1988), however, suggests that a "but for" relationship survives the due process inquiry.

Finally, the Seventh Circuit has upheld jurisdiction under the Illinois long-arm statute, and the Due Process Clause, for claims that "lie in the wake of the commercial activities by which the defendant submitted to the jurisdiction of the Illinois courts." *See Deluxe Ice Cream Co.* v. *R.C.H. Tool Corp.*, 726 F.2d 1209, 1215-16 (7th Cir. 1984) (breach of warranty); *In re Oil Spill by Amoco Cadiz*, 699 F.2d 909, 915-16 (7th Cir. 1983) (indemnity action), *cert. denied*, 464 U.S. 864. Whether this indeterminate standard would encompass tortious negligence committed outside the forum is unknown. *Cf. Simpson* v. *Quality Oil Co.*, 723 F.Supp. 382, 388 & n.4 (S.D. Ind. 1989) (suggesting that relatedness is limited to those contacts substantively related to the cause of action).

On the other hand, the Second and Eighth Circuits, as well as this one, appear to approve a proximate cause standard. *See Pleasant Street*, 960 F.2d at 1089; *Pearrow* v. *National Life & Accident Ins. Co.*, 703 F.2d 1067, 1069 (8th Cir. 1983); *Gel-*

fand v. *Tanner Motor Tours, Ltd.*, 339 F.2d 317, 321-22 (2d Cir. 1964). The courts in *Pearrow* and *Gelfand* found that, for purposes of the long-arm statute at issue, non-forum negligence claims did not arise from in-forum solicitation or ticket sales. District courts from the Third and Tenth Circuits have reached similar results. *See Wims* v. *Beach Terrace Motor Inn, Inc.*, 759 F.Supp. 264, 267-68 (E.D. Pa. 1991); *Dirks* v. *Carnival Cruise Lines*, 642 F.Supp. 971, 975 (D. Kan. 1986).

This circuit, whether accurately or not, has been recognized as the main proponent of the proximate cause standard. We think the attraction of proximate cause is twofold. First, proximate or legal cause clearly distinguishes between foreseeable and unforeseeable risks of harm. *See Peckham* v. *Continental Casualty Ins. Co.*, 895 F.2d 830, 836 (1st Cir. 1990). Foreseeability is a critical component in the due process inquiry, particularly in evaluating purposeful availment, and we think it also informs the relatedness prong. *See Pleasant Street*, 960 F.2d at 1089. As the Supreme Court said in *Burger King Corp.* v. *Rudzewicz*,

> [the Due Process Clause] requir[es] that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign. . . ." [T]his "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, and the litigation results from alleged injuries that "arise out of or relate to" those activities.

471 U.S. 462, 472. Adherence to a proximate cause standard is likely to enable defendants better to anticipate which conduct might subject them to a state's jurisdiction than a more tenuous link in the chain of causation. Certainly, jurisdiction that is

premised on a contact that is a legal cause of the injury underlying the controversy — *i.e.*, that "form[s] an 'important, or [at least] material, element of proof' in the plaintiff's case," *Pleasant Street*, 960 F.2d at 1089 (citation omitted) — is presumably reasonable, assuming, of course, purposeful availment.

As our discussion suggests, and notwithstanding any contrary implication from the footnote in *Ticketmaster*, we think the proximate cause standard better comports with the relatedness inquiry because it so easily correlates to foreseeability, a significant component of the jurisdictional inquiry. A "but for" requirement, on the other hand, has in itself no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain. True, as the Ninth Circuit has noted, courts can use the reasonableness prong to keep Pandora's jar from opening too wide. But to say that the harm that might be done by one factor can be prevented by another is not, after all, an affirmative justification for the former.

That being said, we are persuaded that strict adherence to a proximate cause standard in all circumstances is unnecessarily restrictive. The concept of proximate cause is critically important in the tort context because it defines the scope of a defendant's liability. In contrast, the first prong of the jurisdictional tripartite test is not as rigid: it is, "relatively speaking, . . . a 'flexible, relaxed standard.'" *Sawtelle*, 70 F.3d at 1389 (citation omitted). We see no reason why, in the context of a relationship between a contractual or business association and a subsequent tort, the absence of proximate cause per se should always render the exercise of specific jurisdiction unconstitutional.

When a foreign corporation directly targets residents in an ongoing effort to further a business relationship, and achieves its purpose, it may not necessarily be unreasonable to subject that corporation to forum jurisdiction when the efforts lead to a

tortious result. The corporation's own conduct increases the likelihood that a specific resident will respond favorably. If the resident is harmed while engaged in activities integral to the relationship the corporation sought to establish, we think the nexus between the contacts and the cause of action is sufficiently strong to survive the due process inquiry at least at the relatedness stage.

This concept represents a small overlay of "but for" on "proximate cause." In a sense it is a narrower and more specific identification of the Seventh Circuit's formulation for jurisdiction-worthiness of claims lying "in the wake" of commercial activities in the forum. It may be that other kinds of fact patterns will be found to meet the basic factor of foreseeability, but we have no occasion here to pronounce more broadly.

This case is illustrative of our reasoning. Through its ongoing correspondence with Kiddie Products, Tak How knew that Kiddie Products employees would stay at its hotel, and could easily anticipate that they might use the pool, a featured amenity of the hotel. The district court thoroughly described this connection.

> The Hotel's solicitation of Kiddie's business and the extensive back-and-forth resulting in Burke's reserving a set of rooms for Kiddie employees and their spouses set in motion a chain of reasonably foreseeable events resulting in Mrs. Nowak's death. The possibility that the solicitation would prove successful and that one or more of the guests staying at the Hotel as a result would use the pool was in no sense remote or unpredictable; in fact, the Hotel included the pool as an attraction in its promotional materials.

899 F.Supp. at 31. While the nexus between Tak How's solicitation of Kiddie Products' business and Mrs. Nowak's death

does not constitute a proximate cause relationship, it does represent a meaningful link between Tak How's contact and the harm suffered. Given these circumstances, we think it would be imprudent to reject jurisdiction at this early stage of the inquiry.

By this approach, we intend to emphasize the importance of proximate causation, but to allow a slight loosening of that standard when circumstances dictate. We think such flexibility is necessary in the jurisdictional inquiry: relatedness cannot merely be reduced to one tort concept for all circumstances. Though we are recognizing a narrow exception to the proximate cause test, we note an additional protection for defendants' rights: "the relatedness requirement . . . authorizes the court to take into account the strength [or weakness] of the plaintiff's relatedness showing in passing upon the fundamental fairness of allowing the suit to proceed." *Ticketmaster*, 26 F.3d at 207.

We recognize it will not always be easy to apply this flexible approach to particular circumstances, but that is a function of the complexity of this area of the law. The jurisdictional inquiry is often a difficult fact specific analysis in which "[t]he greys are dominant and even among them the shades are innumerable." *Pleasant Street*, 960 F.2d at 1088 (citing *Estin* v. *Estin*, 334 U.S. 541, 545).

B. Purposeful Availment

The next issue is whether Tak How's contacts with Massachusetts constitute purposeful availment. The purposeful availment requirement ensures that jurisdiction is not premised on "random, isolated, or fortuitous" contacts with the forum state, *Sawtell*, 70 F.3d at 1391 (quoting *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770-74), but rather guarantees that the exercise of jurisdiction is "fair, just, or reasonable." *Id.* (quoting *Rush* v. *Savchuk*, 444 U.S. 320, 329). Our two focal points are voluntariness and foreseeability. *Ticketmaster*, 26 F.3d at 207.

The defendant's contacts with the forum state must be voluntary — that is, not based on the unilateral actions of another party or a third person. *Burger King*, 471 U.S. at 475; *Vencedor Mfg. Co.* v. *Gougler Indus., Inc.*, 557 F.2d 886, 891 (1st Cir. 1977). In addition, the defendant's contacts with the forum state must be such that he should reasonably anticipate being haled into court there. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297; *Escude Cruz* v. *Ortho Pharmaceutical Corp.*, 619 F.2d 902, 905 (1st Cir. 1980).

We think that Tak How's unprompted June 1993 correspondence with Kiddie Products, which led directly to the ill-fated Hong Kong trip in September 1993, was at least minimally sufficient to satisfy this requirement. The June 1993 correspondence contained promotional materials from the Holiday Inn designed to further entice Kiddie Products employees to stay at the hotel. Even if it may be said that the materials were sent as part of an ongoing relationship between the two companies that was originally instigated by Kiddie Products, the continued correspondence by Tak How to Massachusetts does not amount to the kind of unilateral action that makes the forum-state contacts involuntary. Tak How had an obvious financial interest in continuing business with Kiddie Products, and the June 1993 correspondence is the best example of an unprompted solicitation designed to facilitate that business relationship. In order to be subject to Massachusetts' jurisdiction, a defendant need only have one contact with the forum state, so long as that contact is meaningful. *McGee* v. *International Live Ins. Co.*, 355 U.S. 220, 223; *Burger King*, 471 U.S. at 475 n.18.

Whether prompted or unprompted, Tak How's ongoing correspondence and relationship with Kiddie Products, designed to bring Massachusetts residents into Hong Kong, rendered foreseeable the possibility of being haled into a Massachusetts court. That Tak How might have to defend itself in a Massa-

chusetts court is certainly foreseeable based on its direct correspondence with Kiddie Products, but its other contacts with Massachusetts reveal an even more substantial attempt by Tak How to purposefully avail itself of the privilege of conducting business activities in the state: Tak How advertised its hotel in national and international publications that circulated in Massachusetts; it solicited by direct mail some of its previous guests residing in Massachusetts; and Tak How listed its hotel in various hotel guides used at travel agencies in Massachusetts. Exercising jurisdiction is appropriate where the defendant purposefully derives economic benefits from its forum-state activities. *Pritzker*, 42 F.3d at 61-62 (citing *Burger King*, 471 U.S. at 476).

C. The Gestalt Factors

Our conclusion that minimum contacts exist in this case does not end the inquiry. Personal jurisdiction may only be exercised if it comports with traditional notions of "fair play and substantial justice." *International Shoe*, 326 U.S. at 320. Out of this requirement, courts have developed a series of factors that bear on the fairness of subjecting a nonresident to a foreign tribunal. *Burger King*, 471 U.S. at 477; *Pleasant Street*, 960 F.2d at 1088. These "gestalt factors" are as follows:

> (1) the defendant's burden of appearing, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies.

Id. (citing *Burger King*, 471 U.S. at 477). The purpose of the gestalt factors is to aid the court in achieving substantial justice,

particularly where the minimum contacts question is very close. In such cases, the gestalt factors may tip the constitutional balance. *Ticketmaster*, 26 F.3d at 209. The Supreme Court's decision in *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, is one such example. In *Asahi*, the question of minimum contacts divided the Court, but eight of the Justices agreed that exercising personal jurisdiction would not comport with notions of fair play and substantial justice. This Court has thus adopted a sliding scale approach. "[T]he weaker the plaintiff's showing on the first two prongs (relatedness and purposeful availment), the less a defendant need show in terms of unreasonableness to defeat jurisdiction." *Ticketmaster*, 26 F.3d at 210. The reverse is equally true: a strong showing of reasonableness may serve to fortify a more marginal showing of relatedness and purposefulness. *See id.* (citing *Donatelli* v. *National Hockey League*, 893 F.2d 459, 465 (1st Cir. 1990)); *see also Sawtelle*, 70 F.3d at 1396.

1. The Burden of Appearance. It would undoubtedly be burdensome for Tak How to defend itself in Massachusetts. Tak How's only place of business is in Hong Kong. This Court has recognized, however, that it is almost always inconvenient and costly for a party to litigate in a foreign jurisdiction. *Pritzker*, 42 F.3d at 64. Thus for this particular gestalt factor to have any significance, the defendant must demonstrate that "exercise of jurisdiction in the present circumstances is onerous in a special, unusual, or other constitutionally significant way." *Id.* Tak How alleges nothing special or unusual about its situation beyond the ordinary cost and inconvenience of defending an action so far from its place of business. Under *Pritzker*, that is not enough: it simply cannot be the case that every Hong Kong corporation is immune from suit in Massachusetts. *But see Ticketmaster*, 26 F.3d at 210 (noting the importance of considering the distance the defendant must travel in giving

weight to this factor in the analysis). We are also persuaded that the burden on Tak How will be minimized by, for example, the availability of transcripts from the Coroner's Court for use in the Massachusetts proceeding.

We have also noted that the burden of appearance is an important gestalt factor primarily because it allows a court to guard against harassing litigation. *Ticketmaster*, 26 F.3d at 211 (citing *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508)). Were there any indication in the record that the Nowaks brought the present suit to harass Tak How, the burden of appearance in Massachusetts might weigh in Tak How's favor; however, the record does not so indicate.

2. Interest of the Forum. Although a forum state has a significant interest in obtaining jurisdiction over a defendant who causes tortious injury within its borders, *Ticketmaster*, 26 F.3d at 211, that interest is diminished where the injury occurred outside the forum state. *Sawtelle*, 70 F.3d at 1395. Nonetheless, our task is not to compare the interest of the two sovereigns — the place of the injury and forum state — but to determine whether the forum state *has* an interest. *Id.* While it is true that the injury in this case occurred in Hong Kong, it is equally true (unlike *Sawtelle*) that significant events took place in Massachusetts giving it an interest in this litigation. Tak How solicited business in the state. As the district court noted, Massachusetts has a strong interest in protecting its citizens from out-of-state solicitations for goods or services that prove to be unsafe, and it also has an interest in providing its citizens with a convenient forum in which to assert their claims. *Burger King*, 471 U.S. at 473. Given the forum-state activities that took place prior to Mrs. Nowak's death, we conclude that Massachusetts has a strong interest in exercising jurisdiction even though the injury took place in Hong Kong.

3. The Plaintiffs' Convenience. This Court must accord deference to the Nowaks' choice of a Massachusetts forum. *See, e.g., Foster-Miller*, 46 F.3d at 151. Regardless, it is obvious that a Massachusetts forum is more convenient for the Nowaks than another forum, particularly a Hong Kong forum. Further, there exists substantial doubt that the Nowaks could adequately resolve the dispute in Hong Kong: Hong Kong's laws regarding contingency fees and posting of security bonds with the court make litigation economically onerous for plaintiffs, and the future of Hong Kong's political system is also uncertain.

4. The Administration of Justice. This factor focuses on the judicial system's interest in obtaining the most effective resolution of the controversy. Usually this factor is a wash, *Ticketmaster*, 26 F.3d at 211; *Sawtelle*, 70 F.3d at 1395, but in one case we held that preventing piecemeal litigation might favor one jurisdiction over another. *Pritzker*, 42 F.3d at 64. Tak How argues that a Massachusetts action would require the application of Hong Kong law, the use of interpreters, and the transportation of key witnesses from Hong Kong that are not subject to compulsory process. On the other hand, the Nowaks point to possible political instability in Hong Kong as the British Colony prepares to revert to Chinese sovereignty. Interpreters and transportation of witnesses would likely also be necessary in Hong Kong. We conclude that the question of efficient administration of justice favors a Massachusetts forum. Given the likelihood that the Nowaks would face great obstacles in Hong Kong due to possible political instability, as well as Hong Kong laws on contingency fees and security bonds, efficiency concerns require a Massachusetts forum. *See United Elec. Workers* v. *163 Pleasant St. Corp.*, 987 F.2d 39, 46-47 (1st Cir. 1993) (finding that fourth gestalt factor weighed against a foreign jurisdiction where "it is far from clear that

there will be any judicial resolution, let alone the most effective judicial resolution, of this controversy" if the case could not proceed in Massachusetts).

5. Pertinent Policy Arguments. The final gestalt factor addresses the interests of the affected governments in substantive social policies. Massachusetts has an interest in protecting its citizens from out-of-state providers of goods and services as well as affording its citizens a convenient forum in which to bring their claims. These interests are best served by the exercise of jurisdiction in Massachusetts. On the other hand, Hong Kong has an interest in protecting visitors to promote and preserve its tourism industry, in protecting its businesses, and in providing all parties with a convenient forum. Only one of Hong Kong's interests — protecting its businesses — might be compromised by a Massachusetts forum, while Massachusetts' primary interest — protecting its citizens — might be compromised by Hong Kong forum. We thus conclude that the final Gestalt factor tips only slightly in the Nowaks' favor.

On balance, we think the gestalt factors weigh strongly in favor of a Massachusetts forum. When considered in combination with the Nowaks' adequate showing on the first two prongs of the constitutional test, we think that, on the specific facts of this case, the exercise of jurisdiction in Massachusetts is reasonable and does not offend the notions of fair play and substantial justice. The district court therefore properly denied Tak How's Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction.

III

Tak How next appeals the denial of its motion to dismiss for *forum non conveniens*. The doctrine of *forum non conveniens* permits a trial court, on a discretionary basis, to dismiss a case where an alternative forum is available in another country

that is fair to the parties and substantially more convenient for them or the courts. *Howe* v. *Goldcorp Invs., Ltd.*, 946 F.2d 944, 947 (1st Cir. 1991), *cert. denied*, 502 U.S. 1095. Application of the doctrine is committed to the sound discretion of the trial court, whose decision will not be reversed absent a clear abuse of discretion. *Mercier* v. *Sheraton Int'l, Inc.*, 981 F.2d 1345, 1349 (1st Cir. 1992) (*Mercier III*) (appeal after remand of *Mercier II*, *infra*; we have previously referred to the district court's opinion as *Mercier I*), *cert. denied*, 508 U.S. 912. This Court finds an abuse of discretion only where the district court (1) failed to consider a material factor, (2) substantially relied on an immaterial factor, or (3) assessed the appropriate factors but clearly erred in weighing those factors. *Mercier* v. *Sheraton Int'l, Inc.*, 935 F.2d 419, 423 (1st Cir. 1991) (*Mercier II*). Since there is a strong presumption in favor of a plaintiff's forum choice, the defendant must bear the burden of proving both the availability of an adequate alternative forum and that considerations of convenience and judicial efficiency strongly favor litigating the claim in the alternative forum. *Id.* at 423-24; *Mercier III*, 981 F.2d at 1349.

We have emphasized that the doctrine of *forum non conveniens* is used to avoid "serious unfairness" and that plaintiff's choice of a forum will be disturbed only rarely. *Howe*, 946 F.2d at 950 (citing *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 259; *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 507). The Supreme Court has provided a list of relevant considerations. "Private interest" factors include relative ease of access to sources of proof, availability of compulsory process, comparative trial costs, ability to enforce a judgment, "and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gilbert*, 330 U.S. at 508. "Public interest" factors include the practical difficulties of unnecessarily imposing upon a busy court the obligation to hear a case more fairly adjudicated elsewhere, the imposition on jurors called to hear a

case that has no relation to their community, and the familiarity of the court with applicable laws. *Id.* at 508-09.

One final principle informs our analysis in this case. The Supreme Court has stated that,

> Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice. He should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative or legal problems.

Koster v. *Lumbermens Mut. Co.*, 330 U.S. 518, 524.

Based on these principles, we are unable to say that the district court abused its discretion. Tak How's first argument is that the district court failed to articulate its reasons for denying the motion to dismiss. It is true that the district judge chose to rule on the motion orally rather than issue a written opinion; however, it is apparent from the hearing transcript that the judge considered relevant factors. Before ruling on the motion, the judge questioned counsel about the plaintiffs' right to have a jury trial in Hong Kong, and he stated that granting the motion would be outcome determinative because, as a practical matter and due to additional burdens under Hong Kong laws, it would be very difficult for the Nowaks to bring suit there. The hearing transcript is certainly not as detailed as the written opinion denying the jurisdictional motion, but the court was entitled to rule on the motion orally.

The question here is whether the district court failed to consider a material factor or failed to correctly weigh the factors. Given that Tak How has the burden of proving the elements of *forum non conveniens*, we shall review the factors alleged to justify dismissal that Tak How has put forth, bearing in mind that *Koster, supra*, places a heavy burden on defendants where, as here, plaintiffs brought suit in their home forum. There is no question that Hong Kong is an available forum, as Tak How is subject to service of process in Hong Kong. *Mercier II*, 935 F.2d at 424. There also appears to be no dispute that Hong Kong would provide an adequate forum in the sense that its courts recognize a similar cause of action. Tak How next contends that the private interest factors of *Gilbert, supra*, weigh in favor of a Hong Kong forum: it notes that it would bear the expense of transporting witnesses to the United States, that it might face difficulty in joining third-party defendants in a Massachusetts court, and that a Hong Kong court might not enforce the judgment of a Massachusetts court. These factors do not constitute the type of "oppressiveness and vexation" required by *Koster* disproportionate to the Nowaks' inconvenience of suing in Hong Kong. The Nowaks would also have to transport witnesses to Hong Kong and later seek to enforce a foreign judgment in their home state. In addition, the Nowaks point to private interest factors that weigh in their favor: they would face financial obstacles because Hong Kong law prohibits contingent fee agreements and requires that they deposit an amount equal to Tak How's costs with the court; also, possible political instability in the region could add further difficulties to litigation in Hong Kong. Regardless of the difficulties the Nowaks might face in Hong Kong, it is enough that Tak How failed to demonstrate either oppressiveness to itself or only a slight or nonexistent interest in convenience on the Nowaks' part. *Koster*, 330 U.S. at 524.

Nor is Tak How able to demonstrate public interest factors that make trial in Massachusetts inappropriate. It points to the

fact that Massachusetts choice-of-law rules require application of Hong Kong law, and that a Hong Kong court would be "more at home" with such laws. This concern is not sufficient to overcome the presumption in favor of plaintiffs' chosen forum. This Court has previously noted that "the task of deciding foreign law [is] a chore federal courts must often perform." *Mercier III*, 981 F.2d at 1357 (quoting *Manu Int'l, S.A.* v. *Avon Prods., Inc.*, 641 F.2d 62, 68 (2d Cir. 1981)). We therefore give this factor little weight. *Id.* Tak How points to no other public interest factor that weighs against a Massachusetts forum.

For the foregoing reasons, the district court's decision to deny Tak How's motions to dismiss for lack of personal jurisdiction and on the grounds of *forum non conveniens* is AFFIRMED.

APPENDIX D.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RALPH M. NOWAK, Admistrator of
the Estate of Sally Ann Nowak,
and Individually,
NICHOLAS M. NOWAK, a minor, by
Ralph M. Nowak, his father
and next friend, and
NATHAN G. NOWAK, a minor, by
Ralph M. Nowak, his father
and next friend,
Plaintiffs,

v.

TAK HOW INVESTMENT LTD.
d/b/a Holiday Inn
Crowne Plaza Harbour View,
Defendant.

CIVIL ACTION
No. 94-11691-WGY

ORDER AND JUDGMENT

YOUNG, D.J. November 9, 1995

A motion having been duly made by the plaintiffs for assessment of damages and judgment by default, and it appearing that the defendant herein is in default and that the default has been duly noted, and it further appearing that the plaintiffs' motion is unopposed by the defendant, it is

ORDERED, ADJUDGED, AND DECREED:

That the plaintiffs recover of the defendant TAK HOW INVESTMENT LTD. judgment in the sum of $3,128,168.33, allocated as follows: $2,128,168.33 to RALPH M. NOWAK as administrator of the Estate of Sally Ann Nowak and Individually, $500,000.00 to NICHOLAS M. NOWAK, $500,000 to NATHAN G. NOWAK, and pre-judgment interest of $500,506.93 to be allocated among the plaintiffs in such proportion as their representative interests may appear.

/s/_____
WILLIAM G. YOUNG
UNITED STATES DISTRICT JUDGE

APPENDIX E.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RALPH M. NOWAK, Admistrator of the Estate of Sally Ann Nowak, and Individually; NICHOLAS M. NOWAK, a minor, by Ralph M. Nowak, his father and next friend; and NATHAN G. NOWAK, a minor, by Ralph M. Nowak, his father and next friend,

Plaintiffs,

CIVIL ACTION
No. 94-11691-WGY

v.

TAK HOW INVESTMENT LTD. d/b/a Holiday Inn Crowne Plaza Harbour View,

Defendant.

MEMORANDUM AND ORDER

YOUNG, D.J. August 29, 1995

This wrongful death diversity action tests the limits of the power of this Court to exercise in personam jurisdiction over an out-of-state defendant. It involves a resident of Massachusetts who accompanied her husband on a business trip to Hong Kong and drowned in the swimming pool of the hotel at which they lodged, allegedly due to the negligence of the hotel and its staff. Her widower and two children, also residents of the Commonwealth, now seek to hold the owner of the hotel account-

able in Massachusetts. To do so, as is frequently the case in like situations, they must overcome the hotel's motion to dismiss for lack of personal jurisdiction and demonstrate the defendant's amenability to suit in this forum. *See Foster-Miller, Inc.* v. *Babcock & Wilcox Canada*, 46 F.3d 138, 145 (1st Cir. 1995) (plaintiff bears burden of proving existence of jurisdiction).

I. Background

Questions of personal jurisdiction require detailed examination of the particular circumstances of each case. *See Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 485-86 (1985); *Pritzker* v. *Yari*, 42 F.3d 53, 60 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 1959 (1995). Therefore, the largely undisputed facts of jurisdictional significance must here be set forth at some length. In deciding the instant motion, the Court employs the *prima facie* standard, considering "only whether the plaintiff has proffered evidence that, if credited, is enough to support findings of all facts essential to personal jurisdiction." *Boit* v. *Gar-Tec Prods., Inc.*, 967 F.2d 671, 675 (1st Cir. 1992); *see also Foster-Miller, Inc.* v. *Babcock & Wilcox Canada*, 46 F.3d 138, 145 (1st Cir. 1995). The plaintiff may not rely on unsupported allegations in the pleadings, but the Court must accept all of the plaintiff's "properly supported proffers" of evidence as true. *Boit*, 967 F.2d at 675.

With that standard in mind, the Court bases its decision herein on the following facts:

Sally Ann Nowak ("Mrs. Nowak") was at all relevant times married to the plaintiff Ralph M. Nowak ("Mr. Nowak") and was the mother of their two minor children, the plaintiffs Nicholas M. and Nathan G. Nowak (collectively, the plaintiffs will be referred to as "the Nowaks"). The Nowaks lived in Marblehead, Massachusetts, and Mr. Nowak was employed as a Preliminary Design Manager in the Marketing Department

of Kiddie Products, Inc. ("Kiddie") in Avon, Massachusetts. Kiddie develops, manufactures, and markets products for infants. As Kiddie engages in extensive business in Hong Kong, its executives frequently travel on business to the Crown Colony. Mr. Nowak customarily made two such business trips each year, and was usually accompanied on one of those trips by Mrs. Nowak. Another Kiddie employee, Marie Burke ("Burke"), Administrative Assistant to the Vice President of Materials Management/Engineering, John N. Colantuone ("Colantuone"), was responsible for scheduling and reserving airline flights, hotel accommodations, and ground transportation for Mr. Nowak and other executives of the company on their trips to Hong Kong.

Kiddie's relationship with the Holiday Inn Crowne Plaza Harbour View (the "Hotel")[1] was initiated by Colantuone, who had been travelling to Hong Kong on Kiddie's behalf since 1982. Prior to 1992, Colantuone stayed at numerous other hotels while in Hong Kong two or three times a year, and first became aware of the Hotel through advertisements on Hong Kong radio sometime around 1983 or 1984. Colantuone later became dissatisfied with the rates and business services provided by the hotels he had been patronizing, conducted research on other possible candidates, and finally decided to try the Hotel in 1992.

Since that time, according to Burke, department employees travelling to Hong Kong have stayed exclusively at the Hotel because the company receives special corporate discount room rates and other benefits, such as complimentary conference rooms and the use of business facilities. Burke has reserved rooms at the Hotel for at least twenty Kiddie employees.

The trip resulting in Mrs. Nowak's death came about as follows. On June 28, 1993, Lana Yip ("Yip"), the Hotel's

[1] The Hotel is the sole asset of the defendant Tak How Investment Ltd. In this opinion, the Court will use the term "Hotel" to refer to both entities.

Commercial Sales Manager, solicited further business from the company by sending Colantuone a message by telecopier:

> It has been our pleasure serving you and your travelling executives at Holiday Inn Crowne Plaza Harbour View. May I take this opportunity to introduce our latest promotion program to you, which valid [*sic*] from now until 30 September 1993. . . . Thank you for your continuous support to our hotel and we look forward to welcoming you back soon.

Attached to the fax were two pages of promotional materials. One, entitled "Crowne Plaza Business Specials," promised a 35% discount "only for corporate discount holders," and listed the special rates available to Kiddie for each of the types of rooms available. The second page listed all the benefits of staying on one of the Hotel's "Executive Floors."

Colantuone's assistant, Burke, responded to Yip's solicitation approximately two weeks later, expressing interest and requesting further information on rooms and rates. Yip promptly replied, and a series of faxes ensued in which Yip furnished Burke with extensive information and Burke eventually reserved rooms at the Hotel for Mr. and Mrs. Nowak; Colantuone and his wife; and three other Kiddie employees. From June 28 to August 25, 1993, Burke and Yip exchanged a total of sixteen messages — each party generating eight. Most of the telecopier traffic concerned changes to the reservation — primarily regarding the size and makeup of the Kiddie contingent and the accommodations desired — initiated by Burke. The final plan called for the Nowaks and the Colantuones to arrive at the Hotel on September 16, 1993.

The Nowaks allege the following in their complaint.[2] On September 18, 1993, Mr. and Mrs. Nowak were registered

[2] As these alleged facts are not of jurisdictional significance, the Court need not, and therefore does not, at this stage express any opinion on their veracity.

guests of the Hotel. At approximately 1:15 P.M., Mrs. Nowak was swimming alone in the Hotel pool. On duty as lifeguards were two employees of the Hotel, Ho-Piu Leung ("Ho") and Ping-Chee Tse ("Ping"). The Hotel had assigned Tse to watch the swimmers from poolside, while it was Ho's responsibility to monitor activity in the pool through a glass wall in the Hotel gymnasium. Ping left his post to go to the storeroom while Mrs. Nowak was "splashing and doing warm up exercises," and when he returned two to three minutes later, he saw Mrs. Nowak at the bottom of the pool. Ping called for Ho's assistance and then dove into the pool in an attempt to rescue Mrs. Nowak. Ping and Ho together pulled her from the pool, and they both observed that although she was not breathing, Mrs. Nowak had a pulse and her eyes were moving. They also noticed that she had vomited and had a small abrasion on the left side of her mouth.

Ping and Ho refused to administer "mouth-to-mouth" cardiopulmonary resuscitation because they were afraid of contracting an infectious disease and did not have a "mouth-to-mouth face guard," a cheap, portable device customarily carried and used by lifeguards and health care workers. Instead, the lifeguards attempted to revive Mrs. Nowak by using the "sylvester" method of resuscitation, an indirect form of ventilation involving manipulation of Mrs. Nowak's arms. This method is known to lifeguards as ineffective and inefficient, and in this case, with tragic results, it proved to be so. The Nowaks now seek to recover damages from the owner of the Hotel, alleging that its negligence caused Mrs. Nowak's death.

II. Discussion

A determination of jurisdiction requires a tripartite analysis. *See Foster-Miller, Inc.* v. *Babcock & Wilcox Canada*, 46 F.3d 138, 144 (1st Cir. 1995); *Pritzker* v. *Yari*, 42 F.3d 53, 60 (1st Cir. 1994). Jurisdiction is proper only where 1) the claim

directly arises out of or relates to the defendant's activities in the forum ("relatedness"); 2) the defendant has "purposefully availed" itself of the privilege of conducting business here; and 3) its assertion is reasonable in light of certain "Gestalt" factors, see § II(C), *infra*. *Foster-Miller*, 46 F.3d at 144. The Court will address each requirement separately.

A. Relatedness

To understand the unique setting of this particular case, it may be helpful to engage in a brief overview of the development of the law as it pertains to the exercise of personal jurisdiction in this District over out-of-state and foreign hotels.

> Under the Massachusetts long-arm statute,
>
> [a] court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's . . . transacting any business in the Commonwealth.

Mass. Gen. Laws Ann. 223A, § 3(a) (1985). In this circuit, reliance on this Massachusetts statute originally proved of little value to Massachusetts residents injured while staying at out-of-state hotels. While plaintiffs could frequently prove various contacts by the defendants with Massachusetts which satisfied the "transacting any business" requirement, these cases invariably foundered on the statutory requirement that the cause of action must be one "arising from" the transaction of business in Massachusetts. *See Crocker* v. *Hilton Int'l Barbados, Ltd.*, 976 F.2d 797, 799 (1st Cir. 1992); *Fournier* v. *Best West Treasure Island Resort*, 962 F.2d 126, 127 (1st Cir. 1992); *Pizarro* v. *Hoteles Concorde Int'l, C.A.*, 907 F.2d 1256, 1258-59 (1st Cir. 1990); *Marino* v. *Hyatt Corp.*, 793 F.2d 427, 430

(1st Cir. 1986). In *Marino*, a slip-and-fall case brought by a Massachusetts resident against a Hawaii hotel, the plaintiff had made reservations to stay at the hotel through a local travel agency. 793 F.2d at 427. Although the First Circuit concluded that the defendant had transacted business in Massachusetts, it held that jurisdiction would not lie under the long-arm statute because the cause of action did not arise out of Hyatt's in-state activities. The Court of Appeals explained that "plaintiffs' advance reservation agreement with Hyatt would hardly be an important, or perhaps even a material, element of proof in their slip and fall case." *Id.* at 430. In so holding, the court rejected the plaintiffs' attempt to characterize their negligence action as one sounding in contract based on the reservation agreement. *Id.*

The First Circuit affirmed *Marino* in *Pizarro*, a case in which the plaintiffs unsuccessfully attempted to invoke the jurisdiction of the district court in Puerto Rico over an Aruba hotel which had advertised in and solicited business from Puerto Rico.[3] 907 F.2d at 1257. The Court of Appeals explicitly rejected the plaintiffs' contention that the "arising out of" requirement was satisfied because "but for" the hotel's conduct within Puerto Rico, they would not have stayed at the hotel, and thus would not have suffered personal injuries. *Id.* at 1259. Analogizing to familiar concepts of tort law, the court stated that the defendant's conduct was not the "legal or proximate cause" of the injury, and thus the injury did not arise out of that conduct. *Id.* at 1259-60. In *Fournier*, the First Circuit again adhered to *Marino* and declined to rethink its position in light of contrary authority from other circuits adopting a more liberal interpretation of the "arising from" requirement. 962 F.2d at 128 (citing *Lanier* v. *American Bd. of Endodontics*,

[3] Puerto Rico's long-arm statute also requires that the plaintiff's cause of action arise out of the defendant's conduct within the forum state. P.R. Laws Ann. tit. 32, app. III, Rule 4.7(a)(1) (Supp. 1987); *Pizarro*, 907 F.2d at 1258.

843 F.2d 901 [6th Cir.], *cert. denied*, 488 U.S. 926 [1988]; *Prejean* v. *Sonatrach, Inc.*, 652 F.2d 1260 [5th Cir. 1981]; and *Shute* v. *Carnival Cruise Lines*, 863 F.2d 1437 [9th Cir. 1988], *withdrawn*, 872 F.2d 930 [9th Cir. 1989], *modified*, 897 F.2d 377 [9th Cirt. 1990], *rev'd on other grounds*, 499 U.S. 585 [1991]).

In January of 1994, this landscape was blurred, if not erased, by the decision of the Supreme Judicial Court of Massachusetts in *Tatro* v. *Manor Care, Inc.*, 416 Mass. 763 (1994). In *Tatro*, the plaintiff, a Massachusetts resident attending a conference in Anaheim, California, slipped and fell in the bathtub at her hotel. After holding that the hotel transacted business in Massachusetts based on its broad range of solicitations and other activities within the state, *id.* at 767-69, the court went on to discuss whether Tatro's injury "arose from" those activities. Tatro argued that but for the hotel's solicitation and subsequent contact with her, the injuries would not have occurred. The court rejected the strict interpretation of *Marino* in favor of the liberal "but for" approach of *Prejean*, *Lanier*, and *Shute*. Jurisdiction was proper, so the Supreme Judicial Court said, because the reserving of a room in an out-of-state hotel "is considered the first step in a train of events that results in the personal injury." *Id.* at 770. The Massachusetts court relied on the rationales employed by the Fifth and Sixth Circuits:

> Logically, there is no reason why a tort cannot grow out of a contractual contact. In a case like this, the contractual contact is a "but for" causative factor for the tort since it brought the parties within tortious "striking distance" of each other.

Id. at 770 (quoting *Prejean*, 652 F.2d at 1270 n.21).

> [Under the Michigan long-arm statute,] a claim arises from a defendant's transaction of business in the

> forum State if the claim was made possible by, or lies in the wake of, the transaction of business in the forum State.

Id. at 771 (quoting *Lanier*, 843 F.2d at 909); *see also Shute*, 897 F.2d at 383-86 (employing "but for" test and concluding tort claim may arise from contract). The Supreme Judicial Court concluded:

> [This] approach is more consistent with the language of our statute and with decisions of this court interpreting it. There is no readily apparent basis in the statutory language ("arising from") for the restrictive proximate cause approach adopted by the First Circuit. . . . But for the defendant's solicitation of business in Massachusetts, and its agreement to provide the plaintiff with hotel accommodations in Anaheim, California, the plaintiff would not have been injured in a room of the hotel. We conclude that the requirements of [the long-arm statute] have been satisfied.

Tatro, 416 Mass. at 771-72.

Interpretation of the reach of the Massachusetts long-arm statute is, of course, only the first step in the jurisdictional analysis. *See Foster-Miller, Inc.* v. *Babcock & Wilcox Canada*, 46 F.3d 138, 144 (1st Cir. 1995). Under the due process clause of the United States Constitution, there must also be present such minimum contacts with the forum that the exercise of personal jurisdiction over the defendant by this Court comports with "traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945).

Analysis of this constitutional dimension has become ever more complex in recent years. The seminal case in this circuit

is *United Electrical, Radio and Machine Workers of America* v. *163 Pleasant Street Corp.*, 960 F.2d 1080 (1st Cir. 1992), in which the Court of Appeals explained:

> In analyzing minimum contacts, we have recognized two types of personal jurisdiction: general and specific. General jurisdiction exists when the litigation is not directly founded on the defendant's forum-based contacts, but the defendant has nevertheless engaged in continuous and systematic activity, unrelated to the suit, in the forum state. . . . Specific personal jurisdiction may be asserted *where the cause of action arises directly out of, or relates to, the defendant's forum-based contacts.*

960 F.2d at 1088-89 (citing *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414-16 [1984] and *Donatelli* v. *National Hockey League*, 893 F.2d 459, 462 [1st Cir. 1990]) (emphasis supplied).[4]

Thus the constitutional prong of specific personal jurisdiction analysis requires an "arising out of" inquiry distinct from that undertaken under the Massachusetts long-arm statute. The current framework of that analysis, however, is not bereft of doubt. If the strict approach of *Marino, Pizzaro*, and *Fournier* applies, notwithstanding its repudiation by the Supreme Judicial Court in the statutory context in *Tatro*, then jurisdiction in this case is dubious. Although one commentator has assumed this to be the case, see Mark M. Maloney, *Specific Personal Jurisdiction and the "Arise From or Relate To" Requirement . . . What Does It Mean?*, 50 WASH. & LEE L. REV. 1265,

[4] The Nowaks have neither demonstrated nor argued that the Hotel has engaged in such continuous and systematic activities in the Commonwealth to subject it to the general jurisdiction of the Massachusetts courts. *See Foster-Miller, Inc.* v. *Babcock & Wilcox Canada*, 46 F.3d 138, 144 (1st Cir. 1995). Therefore, the case must rise or fall on the applicability of specific jurisdiction.

1282-84 (1993) (calling the *Marino/Pizarro* standard the "substantive-proximate cause test"), and the First Circuit has used language arguably supporting this view, see *163 Pleasant Street*, 960 F.2d at 1089, the question was answered by a recent decision, *Ticketmaster-New York, Inc.* v. *Alioto*, 26 F.3d 201 (1st Cir. 1994). In that case, the Court of Appeals rejected the notion that its "substantive-proximate cause test" constituted an "innovative constitutional test," stating instead:

> In our view, these cases — which interpret the term "arising from" as that term is used in the long-arm statutes of Massachusetts . . . and Puerto Rico . . . — *deal with state-law issues and have no real implications for the relatedness requirement specifically or for constitutional analysis generally.*

Ticketmaster, 26 F.3d at 207 n.8 (citing *Marino, Pizarro*, and *Fournier*) (emphasis supplied); *see also Crocker* v. *Hilton Int'l Barbados, Ltd.*, 976 F.2d 797, 799 (1st Cir. 1992) (applying "crystal clear" precedent of *Marino* in determining inapplicability of Massachusetts long-arm statute). Therefore, given the Supreme Judicial Court's primacy in the interpretation of the statutes of Massachusetts, see *Sabetti* v. *DiPaolo*, 16 F.3d 16, 19 (1st Cir.), *cert. denied*, 115 S.Ct. 293 (1994), *Tatro* has apparently consigned the "arising out of" analysis of *Marino* and its progeny to the dustbin of First Circuit jurisprudence.

In its place is a far more liberal approach to relatedness, the "least developed prong of the due process inquiry." *Ticketmaster*, 26 F.3d at 206 ("We know to a certainty only that the requirement focuses on the nexus between the defendant's contacts and the plaintiff's cause of action"). The constitutional requirement of *Helicopteros*, 466 U.S. at 414, that the cause of action arise out of *or* related to the in-state conduct "portends added flexibility and signals a relaxation of the applicable

standard." *Id.*; *see also Pritzker*, 42 F.3d at 61 (jurisdiction proper where dispute would not have occurred "but for" contract representing defendant's in-state activities). The hallmark of relatedness analysis remains the element of causation. *Ticketmaster*, 26 F.3d at 207.

Applying this flexible standard to the case before it, the Court concludes that the causes of action asserted by the Nowaks arose out of or related to the Hotel's transaction of business within the Commonwealth of Massachusetts under both the long-arm statute as interpreted in *Tatro* and the Constitution.[5] The Hotel's solicitation of Kiddie's business and the extensive back-and-forth resulting in Burke's reserving a set of rooms for Kiddie employees and their spouses set in motion a chain of reasonably foreseeable events resulting in Mrs. Nowak's death. The possibility that the solicitation would prove successful and that one or more of the guests staying at the Hotel as a result would use the pool was in no sense remote on unpredictable; in fact, the Hotel included the pool as an attraction in its promotional materials. The Nowaks' claim was "made possible by, [and] lies in the wake of" the Hotel's Massachusetts contacts. *See Tatro*, 416 Mass. at 771 (quoting *Lanier*, 843 F.2d at 909). In the Fifth Circuit's evocative phrase, the Hotel's conduct brought the parties within "tortious striking distance" of each other. *Prejean*, 652 F.2d at 1270 n.21 (interpreting Texas long-arm statute). The Supreme Court has recognized that the formation of a contract is "but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." *Burger King*, 471 U.S. at 479 (quoting *Hoopeston*

[5] Given the liberal construction of the statute and the proffered evidence, there is no doubt but that the Hotel "transact[ed] any business" in the Commonwealth. *See Tatro*, 416 Mass. at 767-68 ("generally the purposeful and successful solicitation of business from residents of the Commonwealth" satisfies the requirement); *Hahn* v. *Vermont Law School*, 698 F.2d 48, 50-51 (1st Cir. 1983). See also the discussion of purposeful availment in Section II(B), *infra*.

Canning Co. v. *Cullen*, 318 U.S. 313, 316-17 [1943]). Here, the "future consequences" and "real object" of the Hotel's Massachusetts contacts was that Massachusetts residents left the state, travelled to Hong Kong, and used the Hotel's facilities. The relatedness requirement is thus constitutionally and statutorily satisfied.

B. Purposeful Availment/Minimum Contacts

The next branch of jurisdictional analysis requires a determination whether the Hotel voluntarily "invok[ed] the benefits and protections" of Massachusetts law, thereby rendering foreseeable and reasonable its compelled presence before the courts in this state. *See Pritzker* v. *Yari*, 42 F.3d 53, 60, 61 (1st Cir. 1994); *Ticketmaster-New York, Inc.* v. *Alioto*, 26 F.3d 201, 207-08 (1st Cir. 1994) (cornerstones of purposeful availment are foreseeability and voluntariness). The standard of purposeful availment is not rigorous, "casts a wide net," *Pritzker*, 42 F.3d at 62, and may be fulfilled by a single act. *See Burger King* v. *Rudzewicz*, 471 U.S. 462, 475 n.18 (1985); *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958); *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Pritzker*, 42 F.3d at 61-63. The question narrows down to

> whether the commercial action taken, in light of the contacts with the forum state it entailed, amounts to a purposeful decision by the nonresident to "participate" in the local economy and to avail itself of the benefits and protections of the forum.

Bond Leather Co. v. *O.T. Shoe Mfg. Co.*, 764 F.2d 928, 933-34 (1st Cir. 1985); *see also Ealing Corp.* v. *Harrods Ltd.*, 790 F.2d 978, 983 (1st Cir. 1986); *Hahn* v. *Vermont Law School*, 698 F.2d 48, 51-52 (1st Cir. 1983).

The Hotel's conduct within the state, as detailed above, is sufficient to support the Court's conclusion that the plaintiff has overcome the "purposeful availment" hurdle and demonstrated the minimum contacts necessary to justify the assertion of jurisdiction. The Hotel, through its agent, Yip,[6] reached into Massachusetts with an unprompted solicitation and sought to entice Massachusetts residents to leave the state and visit its Hong Kong facilities. Although the Hotel and Kiddie employees had done business together in the past,[7] the discrete series of events resulting in Mrs. Nowak's death were set in motion by the Hotel's solicitation of June 28, 1993. Even if the Nowaks or Kiddie had decided on their own to return to the Hotel and had contacted the Hotel to implement that intention, that fact would not necessarily compel a finding that the Hotel did not thrust itself into the Massachusetts economy and purposefully avail itself of Massachusetts law. *See, e.g., Carlson Corp.* v. *University of Vermont*, 380 Mass. 102, 109 n.11 (1980) ("fact that the resident plaintiff may have initiated the entire business relationship is not a fact which is entitled to constitutional consideration"); *Good Hope Indus., Inc.* v. *Ryder Scott Co.*, 378 Mass. 1, 11 (1979) ("nondispositive is the fact that the plaintiffs made the initial solicitations with respect to these transactions").

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[6]Given the nature of the corporate form and the legal fictions surrounding it, the out-of-state activities of an authorized agent may subject a corporation to personal jurisdiction in that state. *See United Elec., Radio and Mach. Workers of Amer.* v. *163 Pleasant Street Corp.*, 960 F.2d 1080, 1090 (1st Cir. 1992).

[7]The Nowaks have submitted evidence that from early 1992 to the fall of 1994, at least twenty Kiddie employees visited the Hotel on at least eight separate trips at a cost of approximately $28,600. Over the same period, the Hotel received approximately $120,000 from at least 82 travelling Massachusetts residents. Although a portion of this activity occurred after Mrs. Nowak's death, these figures nonetheless demonstrate both that the Hotel meaningfully participated in the economy of Massachusetts in a purposeful availment sense and that it transacted business in the state pursuant to the long-arm statute.

The Nowaks have also proffered a good deal of evidence of other contracts within Massachusetts by the Hotel.[8] While there is no evidence that the Nowaks or Kiddie knew of or relied upon these other contacts, they nonetheless demonstrate the Hotel's substantial attempts to do business in Massachusetts and involve itself in the economy of the state, making its appearance before courts sitting in the state fair and foreseeable. *See Good Hope*, 378 Mass. at 10 n.17 (defendant's unrelated Massachusetts contacts "noteworthy as indicative of the defendant's intention to involve itself in Massachusetts commerce . . . [and are] supportive of the plaintiff's contention that the defendant generally sought to engage in business activity in Massachusetts, and reasonably ought to be expected to defend itself here").[9]

The Court thus holds that the minimum contacts necessary to support jurisdiction exist in this case.

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[8] For example, two affiants, unrelated to this litigation, aver that they have stayed at the Hotel in connection with their businesses, and have received unsolicited brochures, fliers and correspondence at their homes in Cohasset and Marlboro, Massachusetts. An affidavit of an employee of Thomas Cook Travel in Cambridge states that the Hotel submitted information and paid a fee to have its facilities listed in various hotel guides published by that agency in an effort to attract business from Thomas Cook's Massachusetts clients. Another affidavit details the inclusion of the Hotel in various publications of the Holiday Inn Priority Club sent to Massachusetts members of that organization. The Nowaks have also proffered additional promotional materials allegedly sent over the last few years by the Hotel to Massachusetts residents. Finally, they have submitted a list of approximately twenty-five advertisements placed by the Hotel between the spring of 1992 and the fall of 1994 in a quarterly publication for business travellers entitled Hotel & Travel Index. According to an attached profile, the Spring 1994 version of the index had a Massachusetts circulation of 1,901. Although not all of this evidence may be directly relevant, some of it occurring following Mrs. Nowak's death, it nonetheless paints a picture of the Hotel as an eager solicitor and recipient of business from Massachusetts residents.

[9] To like effect is evidence submitted by the Nowaks of the Hotel's continued solicitations of Kiddie business after Mrs. Nowak's death. Those efforts included a letter dated July 18, 1994 from Doris Li, a Hotel Sales Executive, requesting an opportunity to visit Kiddie at its Avon headquarters in an attempt "to look after your company's hotel needs." Although there is no evidence that such a visit took place, the letter is nonetheless forceful evidence of the Hotel's intention purposefully to avail itself of the laws and economy of Massachusetts.

C. The Gestalt Factors

Having determined that the Massachusetts long-arm statute applies and that minimum contacts exist, the Court must now inquire whether the assertion of jurisdiction would, "holistically viewed, offend traditional notions of 'fair play and substantial justice.'" *Pritzker* v. *Yari*, 42 F.3d 53, 63 (1st Cir. 1994). In simpler terms, the question is whether the exercise of jurisdiction is reasonable. The First Circuit has explained:

> [T]he Due Process Clause bars a court from asserting jurisdiction over the person of a defendant if doing so would be fundamentally unfair. In this context, gauging fairness requires an assessment of reasonableness for, in certain circumstances, unreasonableness can trump a minimally sufficient showing of relatedness and purposefulness. . . . [T]he reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff's showing on the first two prongs (relatedness and purposeful availment), the less a defendant need show in terms of unreasonableness to defeat jurisdiction. The reverse is equally true: an especially strong showing of reasonableness may serve to fortify a borderline showing of relatedness and purposefulness.

Ticketmaster-New York, Inc. v. *Alioto*, 26 F.3d 201, 210 (1st Cir. 1994). To guide the analysis, the Court of Appeals has identified five factors for consideration: 1) the burden on the defendant of appearing in a foreign jurisdiction; 2) the forum state's interest in adjudicating the dispute; 3) the plaintiff's interest in obtaining convenient and effective relief; 4) the judicial system's interest in obtaining the most effective resolution of the controversy; and 5) the common interests of all sovereigns in promoting substantive social policies. *Pritzker*,

42 F.3d at 63-64. Consideration of these factors "illuminate[s] the equitable dimensions" of the situation before the Court. *Foster-Miller, Inc.* v. *Babcock & Wilcox Canada*, 46 F.3d 138, 150 (1st Cir. 1995).

In this case, the Gestalt factors weigh in favor of jurisdiction, and thus, according to the dictate of *Ticketmaster*, bolster the Court's determinations on relatedness and purposeful availment.[10] The ordinary cost and inconvenience of litigating in another forum is insufficient to render the first factor meaningful. Rather, under First Circuit jurisprudence, there must be "some kind of special or unusual burden." *Pritzker*, 42 F.3d at 64. The number of miles from Hong Kong to Boston, while significant, is not, by itself, sufficiently onerous to affect the constitutionality of asserting jurisdiction over the Hotel.[11] While the Court is not unmindful of the burden thereby imposed on the Hotel, it is but an ancillary cost of doing business within this district.

The second factor, the forum state's interest, also works in the Nowaks' favor. The Commonwealth has a strong interest in protecting its citizens from out-of-state solicitations or advertisements for goods or services which prove to be unsafe. The concern of Massachusetts for the safety of its citizens does not end when the citizen crosses the border for business or personal reasons. It cannot be gainsaid that the primary function of the Commonwealth — or any other government — is to guarantee and promote the health, safety, and welfare of its citizens. Mass. Const. pt. 1, art. 7; *id.* preamble; *see also Bowman* v.

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[10] This does not necessarily indicate that the case for relatedness and purposeful availment is in any sense "borderline."

[11] Although the *Ticketmaster* court was concerned with the burden of forcing a California resident to defend himself in Massachusetts, that case was permeated, and the weighing of Gestalt factors informed, by a fear that the plaintiff may have chosen the distant forum to vex, harass, or oppress the defendant. 26 F.3d at 210-12 (inconvenience to defendant renders jurisdiction unreasonable as factor "may serve as an amulet to ward off vexatiousness and harassment"). No such concern is here present.

Chicago, 125 U.S. 465, 517 (1888) (Harlan, J., dissenting). The state also has a " 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Burger-King*, 471 U.S. at 473. While Hong Kong also has an interest in assuring the safety of visitors and in governing the relationship between local entities and their invitees, those interests must give way to those of the Commonwelth insofar as the second factor focuses on the interest of the forum.

The third and fourth factors, the interest of the plaintiff and of the judicial system in convenient and effective relief, favor the exercise of jurisdiction by this Court. The Court must accord the Nowaks' choice of forum a measure of deference "in respect to the issue of [their] own convenience," *Pritzker*, 42 F.3d at 64, and it appears that the Nowaks' convenience is substantially enhanced by litigating here. In fact, forcing the Nowaks to litigate in Hong Kong may very well prove prohibitively burdensome.[12] *See id.* (noting "enormous inconvenience" to plaintiff that might result from denying jurisdiction). Furthermore, the uncertain future of the Hong Kong legal system, given the island's reversion to Chinese sovereignty in less than two years, counsels heavily in favor of jurisdiction to ensure that the Nowaks have the opportunity to obtain redress, if any be appropriate, for the grievous loss they have suffered.

Finally, there are the common interests of all sovereigns involved in promoting substantive social policies. As noted, Massachusetts has a substantive social policy of protecting its

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[12] The Nowaks submit that as a family of modest means, they will not be able to retain Hong Kong counsel if the case were to be tried there because Hong Kong does not permit its attorneys to enter into contingent fee agreements.

It is not without some irony that at the moment various interest groups seek "reform" of our American contingent fee system, this Court relies on that system as favoring the exercise of jurisdiction here in comparison to Hong Kong as it undeniably affords these individuals plaintiffs access to the courts.

citizens and providing a forum for redress of grievances. Hong Kong has a similar social policy of protecting visitors, and also seeks to protect and promote its businesses. The fifth factor is, therefore, essentially neutral in the present analysis.

In the aggregate, however, the policies promoted by the five factors will be better advanced by the exercise of jurisdiction than by its declination.

III. Conclusion

For the reasons set forth above, the Court may and does hereby exercise jurisdiction over the defendant Tak How Investment Ltd. consistent with the Constitution and the Massachusetts long-arm statute. The motion to dismiss must therefore be DENIED.

/s/_____
WILLIAM G. YOUNG
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
FEB 27 1997
CLERK

No. 96-1052

In The

Supreme Court of the United States

October Term, 1996

TAK HOW INVESTMENT LIMITED,
Petitioner,

v.

RALPH M. NOWAK, ADMINISTRATOR OF THE ESTATE OF SALLY ANN NOWAK AND INDIVIDUALLY, NICHOLAS M. NOWAK, A MINOR, BY RALPH M. NOWAK, HIS FATHER AND NEXT FRIEND, AND NATHAN G. NOWAK, A MINOR, BY RALPH M. NOWAK, HIS FATHER AND NEXT FRIEND,
Respondents.

On Petition for a Writ of Certiorari to the Untied States Court of Appeals for the First Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents respectfully submit the following Brief in Opposition to Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This lawsuit concerns the wrongful death claims of the widower and two children of a woman who drowned in the swimming pool of the Holiday Inn Crowne Plaza Harbour View in Hong Kong.[1] This case was originally commenced in State court and was removed by the defendant to the United States District Court for the District of Massachusetts. Following removal, the defendant filed two motions to dismiss; one, on grounds that the District Court lacked *in personam* jurisdiction and another, on grounds of *forum non conveniens*. The issues of *in personam* jurisdiction and *forum non conveniens* were separately briefed by the parties, and on April 25, 1995, the District Court heard argument on both issues. The motion to dismiss on grounds of *forum non conveniens* was denied from the bench following argument, and the motion to dismiss on grounds that the District Court lacked *in personam* jurisdiction was denied in a memorandum and order, dated August 29, 1995. (29A).[2] Following the District Court's denial of the defendant's motions to dismiss, the defendant deliberately defaulted, thereby waiving its right to a full adjudication of the facts at a

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[1] The Petitioner's Statement Of The Case for this Court omits certain material facts found by the District Court and affirmed on appeal. Accordingly, the Respondents rely on the facts set forth in the opinion of the District Court, *Nowak v. Tak How Investment Ltd.*, 899 F.Supp. 25 (D.Mass. 1995), and in the opinion of the Court of Appeals, *Nowak v. Tak How Investment Ltd.*, 94 F.3d 708 (1st Cir. 1996). Citations to those opinions refer to the opinions as reprinted in the appendix to the Petition For A Writ Of Certiorari.

[2] References to pages in the appendix to the Petition For A Writ Of Certiorari are cited as "___A."

trial.[3] On November 9, 1995, the District Court entered default judgment against the defendant, (A27), from which the appeal to the United States Court of Appeals for the First Circuit was taken. The sole basis for the appeal was the District Court's denial of the two motions to dismiss.

The Court of Appeals affirmed the District Court's decision to deny the defendant's motions to dismiss for lack of *in personam* jurisdiction and on the grounds of *forum non conveniens*.

REASONS FOR DENYING THE WRIT

The petition only presents argument on the issues raised in the first of its four "questions presented for review." Therefore, this brief responds only to those issues.

In its opinion, (3A), the Court of Appeals stated the rule of law as to "specific jurisdiction" as follows:

> [The Court of Appeals] follows a tripartite analysis for determining the existence of specific personal jurisdiction (plaintiffs do not allege general personal jurisdiction): First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state

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[3] This would include facts relating to the issue of jurisdiction. "When a court...denies a motion because the plaintiff fails to make a *prima facie* showing, a denial of the motion to dismiss is an implicit deferral until trial of the final ruling on jurisdiction." *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 678 (1st Cir. 1992).

> activities. Second, the defendant's forum-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's court foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable. (8A).

This statement is consistent with numerous Supreme Court rulings since 1945.

The modern state of the rule of law pertaining to the exercise of specific jurisdiction over a defendant, consistent with the constraints imposed by the Due Process Clause of the Fourteenth Amendment, first emerged when the Supreme Court decided *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The Court stated that:

> [T]o the extent that a corporation exercises the privilege of conducting activities within the state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

International Shoe Co. v. Washington, 326 U.S., at 319.

Since *International Shoe*, the Supreme Court has provided consistent and ample guidance on the application of this rule of law. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1984) this Court stated that the Due Process Clause required "fair warning that a particular activity may subject [defendants] to the jurisdiction of a foreign sovereign" in order to permit defendants to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." This Court also held, in *Burger King Corp. v. Rudzewicz*, 471 U.S., at 472, that:

> [The] "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, [citation omitted], and the litigation results from alleged injuries that "arise out of or relate to" those activities [citation omitted].

And while *International Shoe Co. v. Washington*, 326 U.S., at 319 informed that "[t]he criteria by which [the Supreme Court] mark[s] the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative," *Burger King Corp. v. Rudzewicz*, 471 U.S., at 475-476 refined this approach, explaining that:

> [W]here the defendant "deliberately" has engaged in significant activities within a State, [citation omitted], or has created "continuing obligations" between himself and residents of the forum, [citation omitted], he manifestly has

> availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

In its examination of the first prong of the tripartite analysis for specific personal jurisdiction, the Court of Appeals stated that "the 'relatedness' test is one aspect of demonstrating minimum contact pursuant to *International Shoe Co. v. Washington*, 326 U.S. 310." (8A). The Court of Appeals described the relatedness requirement under the Due Process Clause of the Fourteenth Amendment as a "flexible, relaxed standard," (14A), that "focuses on the nexus between the defendant's contacts and the plaintiff's cause of action," (10A), requiring that a "meaningful link" exists between the defendant's contact with the forum and the cause of action. (15A- 16A). This analysis mirrors the Supreme Court's view that "[i]t is sufficient for purposes of due process that the suit was based on a contact which had a substantial connection with that State." *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957). That is to say, "[j]urisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S., at 475. "The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*." *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112 (1986).

Observing that "in the context of a relationship between a contractual or business association and a subsequent tort, the absence of proximate cause per se should [not] always render the exercise of specific jurisdiction unconstitutional," (14A), when reviewing the Petitioner Hotel's contacts with the forum, the Court of Appeals stated:

> When a foreign corporation directly targets residents in an ongoing effort to further a business relationship, and achieves its purpose, it may not necessarily be unreasonable to subject that corporation to forum jurisdiction when the efforts lead to a tortious result. The corporation's own conduct increases the likelihood that a specific resident will respond favorably. If the resident is harmed while engaged in activities integral to the relationship the corporation sought to establish, we think the nexus between the contact and the cause of action is sufficiently strong to survive the due process inquiry at least at the relatedness stage. (14A - 15A).

Again, this is simply a restatement of the Supreme Court's language in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-298 (1979):

> Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its products in other States, it is not unreasonable to

> subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

The Petitioner's primary argument,[4] that this case presents the question left unanswered in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n.10 (1984), is a red herring. The question described in footnote 10 of *Helicopteros Nacionales de Colombia, S.A.* was "left unanswered" merely because the parties to that case stipulated that specific jurisdiction was not relevant to the case. However, the question in footnote 10 is not *undecided* by the Supreme Court, as the Petitioner has implied. This question has plainly been addressed by the Supreme Court. *See, International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Hanson v. Denckla*, 357 U.S. 234 (1957); *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1979); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1984); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1986).

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[4] Set forth as the first "Question Presented", page i, and argued on page 13 of the petition.

Nor, as the petition proclaims, are the various courts of appeal "hopelessly muddled,"[5] in "utter conflict and confusion,"[6] over their approach to the issue of relatedness. In its opinion, (11A-12A), the Court of Appeals explained that the Ninth and Fifth Circuits[7] apply a "but for" test for relatedness; the Sixth Circuit applies a "substantial connection" standard; and the Seventh Circuit has upheld claims that "lie in the wake of commercial activities." These are merely variations on the "substantial connection" standard recommended by the Supreme Court in *McGee v. International Life Insurance Co.*, 355 U.S., at 223; *Burger King Corp. v. Rudzewicz*, 471 U.S., at 475; and, *Asahi Metal Industry Co. v. Superior Court*, 480 U.S., at 112. As noted in the opinion of the Court of Appeals, (12A-13A), the courts in the Second, Eighth, Third and Tenth Circuits have employed a "proximate cause standard," but only for the purposes of applying State long-arm statutes. In light of abundant precedent, the courts of appeal in these Circuits will, no doubt, also apply a relatedness test derived from the Supreme Court's "substantial connection" standard when addressing the law pertaining to the exercise of specific jurisdiction. In any event, the decision of the Court of Appeals can hardly be said to be in conflict with the decisions of other United States court of appeals on this issue.

In deciding this case, the Court of Appeals properly stated and correctly applied the law pertaining to specific jurisdiction. Therefore, this Court should decline to issue the requested writ.

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[5] Page 13 of the petition.

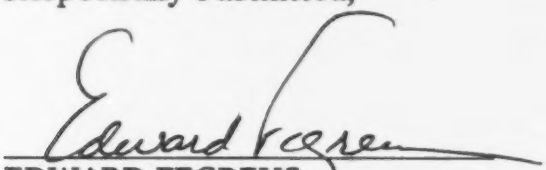
[6] Page 17 of the petition.

[7] And now the First Circuit.

CONCLUSION

For the reasons set forth above, the Respondents request that this Court decline to issue the requested writ.

Respectfully Submitted,



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